Riparian Zones in Public Waters
Administrative Cause No. 07-045A

1. Tendered Advisory Council Project Overview

The Department of Natural Resources and the Natural Resources Commission face a myriad of issues pertaining to competing uses of public waters. Some of these are also being actively reviewed by the Lakes Management Work Group. Some are the subject of pending rule adoptions before the NRC, and the genesis of several rule adoptions are within the DNR. Other issues have been adjudicated through the NRC's Division of Hearings and its AOPA Committee. Among the latter, where combined with reported decisions from the Indiana high courts, there is now a substantial body of experience for zones of influence of riparian owners. Although the recent experience has been almost entirely from "public freshwater lakes", the principles also have direct application to "navigable waters". There are indications that identifying the zones of influence in navigable waters is becoming a more active issue.

The Natural Resources Advisory Council is being asked to consider a project to provide guidance to the DNR, the NRC, and potentially the Lakes Management Work Group or the Indiana General Assembly, concerning the delineations of riparian zones, as between neighbors and as they relate to the public use of public waters. The articulation of the guidance would assist the DNR's resource managers as well as the regulated citizens. A cautionary note is that determining how to delineate riparian zones is not a *carte blanche* issue. Common law is the legal root, and it must be appropriately incorporated. Within this limitation, guidance can provide a valuable service to a broad audience.

A threshold question may be what option is the most appropriate process:

(1) Continue exclusively with the current approach of developing precedents through the NRC's administrative law judges and the NRC's AOPA Committee (published in "Caddnar") and through the Courts.
(2) Develop a "nonrule policy document" to synthesize and conceptualize the precedents developed under option (1), with the possible inclusion of principles used by licensed surveyors to delineate riparian zones.
(3) Develop a rule to direct the application of principles pertaining to the delineation of riparian zones.

(4) Recommend legislation to direct the application of principles pertaining to the delineation of riparian zones.
(5) Some combination of options (1) through (4).

A brief background follows. Perhaps more importantly, the background is then augmented with an Appendix that sets forth edited or digested decisions (with official or unofficial graphics) pertaining to the delineation of riparian zones and the public trust.

2. State Agencies and the Public Trust Doctrine on Public Waters

The DNR and the NRC, on administrative review, are the state agencies primarily responsible for the administration of Indiana's public waters. For the purposes of this project, public waters refer to those that are either "navigable" or a "public freshwater lake".

The "public trust doctrine" provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The doctrine also sets limits on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets. "The Public Trust Doctrine on Navigable Waters and Public Freshwater Lakes and the Lake Management Work Groups", Information Bulletin #41 (First Amendment), Natural Resources Commission (March 1, 2007).

The best-known application of the public trust doctrine has been for navigable waters. Even before Indiana achieved statehood, the Northwest Ordinance of 1787 recognized the public interest in our territory's navigable waters. The ordinance declared:

> [T]he navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and of those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

A waterway is "navigable" if it was capable of commercial navigation in 1816 when Indiana was admitted to statehood. *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950).

Without using the phrase “public trust doctrine", Indiana's high courts have long recognized the concept. In 1918, for example, the Indiana Appellate Court found the state held the bed of Lake Michigan in trust for the people. *Lake Sand Co. v. State*, 68 Ind. App. 439, 120 N.E. 715 (1918).

3. Navigable Waters

The DNR is the state agency with “general charge” of navigable waters. IC 14-19-1-1(9). Public recreational and commercial usage of the surface of a river, stream or lake often depends upon whether the water is navigable. State legislation also establishes regulatory functions that rest upon a determination of navigability. For example, the DNR may require an approved license before a person can:

- place, fill, or erect a permanent structure in;
- remove water from; or
- remove material from

a navigable waterway. In evaluating a license application for activities on navigable waters, the agency shall consider whether the anticipated facility would unreasonably impair the navigability of the waterway, cause significant harm to the environment, or pose an unreasonable hazard to life or property. IC 14-29-1-8 and 312 IAC 6.

4. Public Freshwater Lakes

In 1947, the Indiana General Assembly extended environmental protections and application of the public trust doctrine to Indiana’s “public freshwater lakes”. A “public freshwater lake” means a lake that has been used by the public with the acquiescence of a riparian owner. The term does not include Lake Michigan; a lake lying at least in part in East Chicago, Gary or Hammond; or, a private body of water used for the purpose of, or created as a result of, surface coal mining. IC 14-26-2-3 and 312 IAC 11-2-17. There are also several other limited exemptions applicable to the definition of “public freshwater lake”. IC 14-26-2-14 through 16.

The statutory chapter that provided for the protection of "public freshwater lakes" is commonly called the "Lakes Preservation Act". This act provides the state has "full power and control of all the public freshwater lakes" and holds and controls "all public freshwater lakes in trust for the use of all citizens of Indiana for recreational purposes". IC 14-26-2-5.

In 2001, the Court of Appeals of Indiana reflected that the Lakes Preservation Act was "[p]ublic trust legislation intended to recognize "the public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes." The Court observed that "Riparian landowners. . .continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights." *Lake of the Woods v. Ralston*, 748 N.E.2d 396 (Ind. App. 2001). In 2005, the Court of Appeals indicated the rights of riparian owners along public freshwater lakes were equivalent to those of riparian owners along navigable waters. *Parkinson v. McCue*, 831 N.E.2d 118 (Ind. App. 2005).

With amendments made to the Lakes Preservation Act in 2001 and 2006, the Indiana General Assembly refocused the responsibilities of the DNR and the NRC regarding the regulation of public freshwater lakes. In evaluating the merits of a license, the DNR shall consider a project's effect on all of the following:

(1) The shoreline, waterline or bed of the lake.
(2) The fish, wildlife or botanical resources.
(3) The vested public rights to natural resources, natural scenic beauty, the preservation and protection of the lakes, and their use for recreational purposes.
(4) The management of boating operations under what is sometimes called the Boating Code (IC 14-15).
(5) The interests of a landowner having property rights abutting the lake or rights to access the lake (essentially, riparian rights as interpreted by the courts).

Also, the NRC was required to establish, by rule, a process for the mediation of *disputes among persons with competing interests or between a person and the" DNR*. Where mediation was unsuccessful, "*a person affected by the determination of the" DNR "may seek administrative review" by the NRC and its administrative law judges*.

5. The Recent Experience

Disputes among competing interests or between riparian owners and the DNR have been fertile grounds for administrative adjudications and mediations. Competition for the enjoyment of finite public waters by a growing population with growing prosperity has been particularly intensive on Indiana's northern public freshwater lakes. What are commonly called "riparian rights disputes", but which typically have elements of competition between private and public usage of public waters as well, are today the most vigorously litigated proceedings before the NRC's administrative law judges and its AOPA Committee. These often take the form of pier disputes between riparian neighbors, including easement and the holders of fee simples. The push between neighbors for space along a shoreline (commonly called a "horizontal dispute") can result in increased competition to extend piers farther from the shoreline and into the open waters of a lake (a vertical dispute). Biologists express concerns for the effects of covering ever greater portions of the lakes with piers, whether near shore or farther from the shore.

APPENDIX

Nosek v. Stryker, 103 Wis. 2d 633, 309 N.W. 2d 868 (1981):

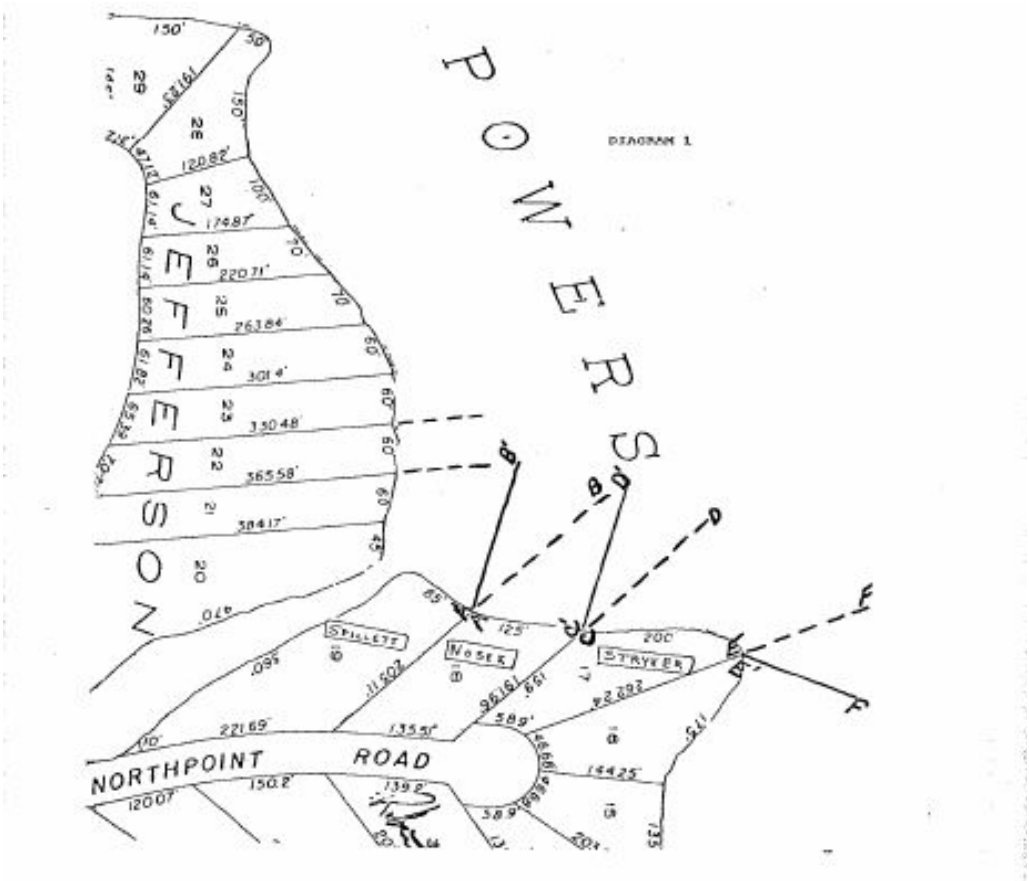
"There is no set rule in Wisconsin for establishing the extension of boundaries into a lake between contiguous shoreline properties. Three general methods, however, are evident from Wisconsin case law. In the least complicated situation, where the course of the shore approximates a straight line and the onshore property division lines are at right angles with the shore, the boundaries are determined by simply extending the onshore property division lines into the lake. [Citations omitted] This method is best illustrated by Diagram 1, which is a portion of Noseks' Exhibit 4, with additions and deletions for illustrative purposes. Lots twenty-one and twenty-two have boundary lines running at a right angle from an approximately straight shoreline. As between these lots, the division can easily be made by extending the onshore division lines. *Nosek* at p. 870.

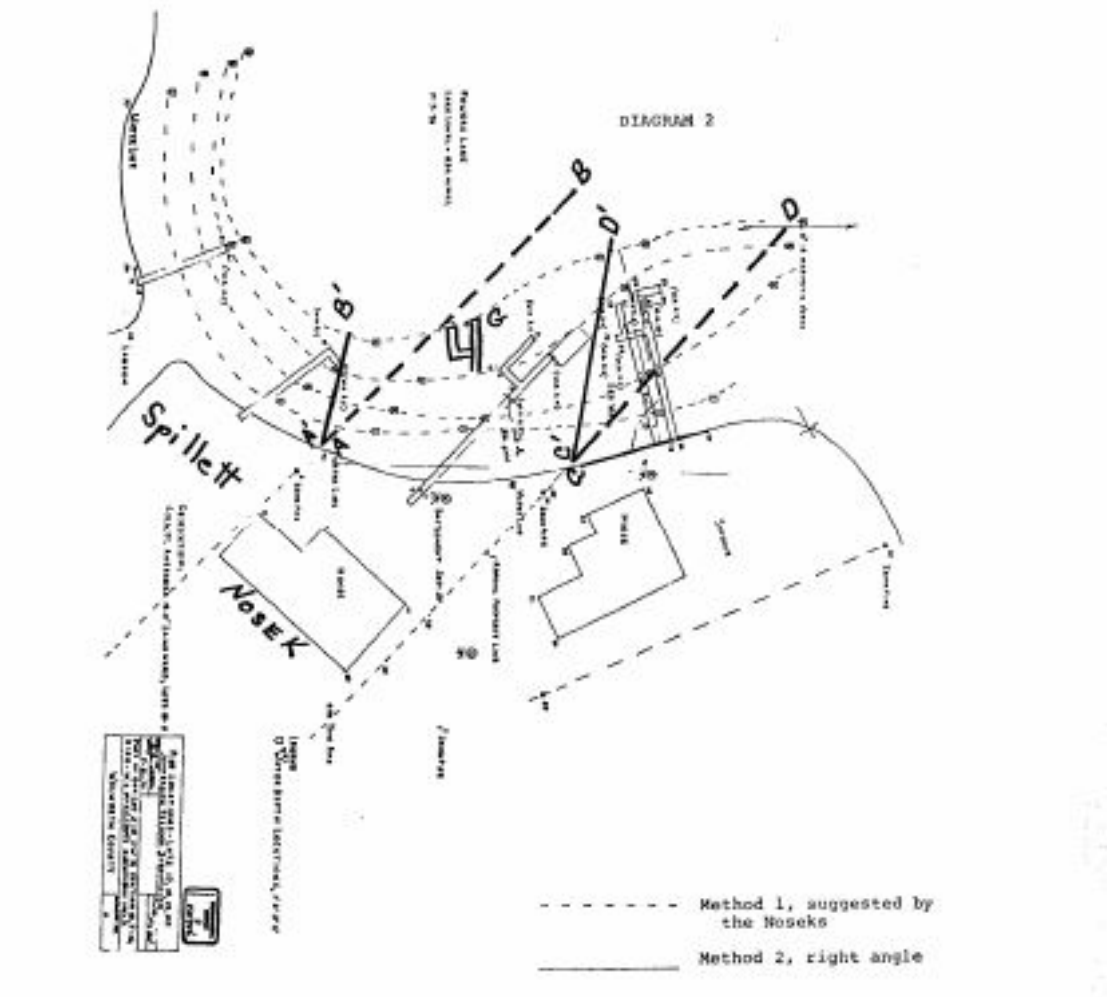
"Often, however, the boundary lines on land are not at right angles with the shore but approach the shore at obtuse or acute angles. In such cases, it is inappropriate to apportion the riparian tract by extending the onshore boundaries. [Citations omitted] Instead, the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries. [Citations omitted] Diagram 1

shows lots eighteen and seventeen as Noseks' and Strykers' respectively. The shore approximates a straight line, but the onshore boundaries converge upon the shoreline at something other than right angles. Using method one, the riparian tract would be formed by merely extending the onshore boundaries. Diagram 1 discloses that the apportioned riparian tracts would be from point A to point B, from point C to point D, and from point E to point F. Using the second method, right angles are drawn from the shoreline, and the onshore boundaries are not extended. The lines are drawn from points A' to B', points C' to D' and points E' to F'. *Nosek* at p. 871.

"A third method is used where the shoreline is irregular. In that case, if it is impossible to draw lines at right angles to the shore to accomplish a just apportionment, then the boundary line should be run in such a way as to divide the toal navigable waterfront in proportion to the length of the actual shorelines of each owner taken according to the general trend of the shore. [Citations omitted] *Nosek* at p. 872.

"There is abundant other evidence, found by the trial court, which justifies use of the right angle method." *Nosek* at p. 874.

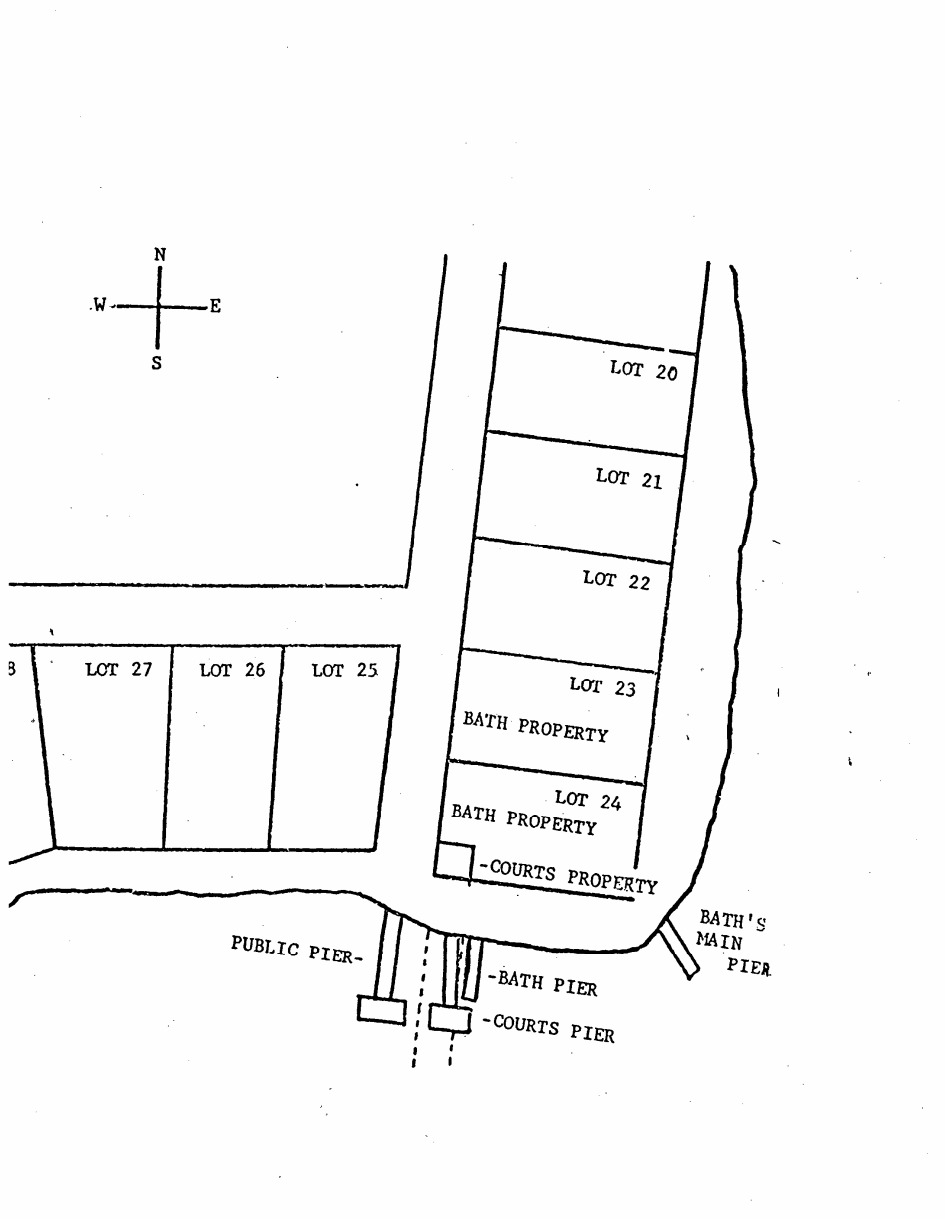




Bath v. Courts, 459 N.E. 2d 72, (Ind. App. 1984):

"There is no set rule in Indiana for establishing the extension of boundaries into a lake, between contiguous shoreline properties. Therefore, to arrive at the most equitable result, we have consulted the law in jurisdictions with numerous lakes. The only case law on point comes from Wisconsin.

"In Wisconsin, where a shoreline approximates a straight line and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore boundaries into the lake. *Nosek v. Stryker* (1981), 103 Wis. 2d 633, 635, 309 N.W.2d 868, 870. Such is the fact situation here. This method, as applied to this case, is best illustrated by the diagram below:



"This diagram shows that the Courts' pier encroaches upon the Baths' riparian tract only if we follow this method and if their tract extends to the length of the pier. Indiana case law supports the adoption of extending the shore boundaries as illustrated in the diagram."

A riparian owner has the right "to maintain a pier so long as it does not interfere with rightful uses of the lake by others. *Bath* at p. 73 and p. 74.

"Riparian rights to accretion support this determination that the onshore boundaries extend out into the lake at a right angle. Accretion, the increase in land caused by earth, sand, or sediment deposits, generates a source of title which usually vests in the riparian owner of the land to which the alluvion attaches. [Citations omitted] If Lake Nyona

were to naturally recede, title to the new land would vest in the riparian owners by the extension of his shore boundaries. Therefore, it seems equitable and practicable in his [sic., this] case to follow the Wisconsin method of extending into the water the onshore boundaries which meet the water at a right angle." *Bath* at p. 74 and p. 75.

"The public and other riparian owners have the right to use Lake Nyona, [a public freshwater lake in Fulton County]. These rights can co-exist only if the riparian right to build a pier is limited by the rights of the public and of other riparian owners. Therefore, riparian owners may build a pier within the extension of his shore boundaries only so far out as not to interfere with the use of the lake by others.

"The Courts' pier unlawfully encroaches upon the Baths' shorefront property…. The interruption of the Baths' view had no weight in this decision. In fact, shorefront property carries with it the view of piers and docked boats. [Citations omitted] As long as the Courts straighten their pier so that it no longer encroaches upon the Bath's riparian rights, this dispute will be settled. While we sympathize with the Courts' desire to add a platform to their pier for further enjoyment, the law as determined above prohibits encroachments upon the riparian rights of another.

"The evidence clearly showed that the Baths did not intend to use the pier for any purpose other than to interfere with the Courts' use of their pier…. [P]iers may be maintained for commerce, navigation, and the owner's enjoyment. A pier built for interference is a violation" of Indiana law. *Bath* at p. 76.

***Zapffe v. Srbeny*, 587 NE.2d 177 (Ind. App. 1992):**

"This court discussed the extent of a riparian landowner's property in *Bath v. Courts*. In *Bath*, riparian landowners built a pier that encroached upon the extended property line of neighboring landowners. In response, the neighboring riparian owners built a pier within two feet of the first pier, interfering with its use. In that case, we recognized that the onshore boundaries of a riparian tract extend into the lake in a line perpendicular to the shore, where the shoreline approximates a straight line…. Nonetheless, we did not determine the precise extent of the riparian landowner's boundaries in *Bath* because state law governed the rights of the respective parties to install a pier.

"Indiana law allows a riparian owner to build 'piers, wharves, docks or harbors in aid of navigation and commerce' on the riparian owner's premises or 'upon the submerged lands beneath the waters thereof….' IC 13-2-4-5. Because of the competing interests of riparian landowners and the public's right to the enjoyment of the waters in Indiana's freshwater lakes, we concluded in bath that riparian owners may build a pier within the extension of their shore boundaries only so far out as not to interfere with the use of the lake by others…. [W]e now address the question left open in *Bath*: How far into a lake do the boundaries of a riparian tract extend?

"One point is well-settled and acknowledged by the parties: the boundaries of riparian property do not extend to the middle of the lake. [Citations omitted] The Zapffes contend that their boundary lines extend to where the normal water level of Bass Lake reaches a depth of five feet. Alternatively, they contend that a boundary line extending 200 feet from shore is suggested by statute. Srbeny submits that the Bath decision proscribes the extension of a riparian tract beyond the finite point where such an extension would interfere with the use of the lake by others [Citations omitted], though Srbeny does not suggest the location of the 'finite point'. *Zapffe* at p. 180.

The Court of Appeals rejected the Zapfee argument based on a minimum water depth of five feet because there was no evidence in the record on which to determine this depth was required for safe navigation. "This statement is mere speculation."

Alternatively, the Zapffes rely on IC 14-1-1-29 that then limited motorboats within 200 feet of the shoreline from operating in excess of 10 miles per hour [the limitation is now "idle speed" (5 miles per hour for most purposes) and is set forth at IC 14-15-3-17]. "From this statute, the Zapffes conclude that their riparian tract would allow them to build a pier two hundred feet long because, in their words, 'it is illegal to operate a motorboat within 200 feet of the shore.' This argument is untenable. By the very language of the statute, it is not illegal to operate a motorboat within 200 feet of the shoreline for trolling or to approach a dock, pier, or the shore. Thus, the pier envisioned by the Zapffes would in fact interfere with the operation of motorboats under the statute. Moreover, such a pier would clearly interfere with the public's right to use the waters of Bass Lake for other recreational purposes" under the Lakes Preservation Act. *Zapfee* at p. 180 and p. 181.

"Instead of a rigid application using a measure of depth or length to determine riparian boundaries, the better view would be to apply a 'reasonableness' test to accommodate the diverse characteristics of Indiana's numerous [public] freshwater lakes. [Citations omitted] Clearly, the installation of a pier is a reasonable use under IC 13-2-4-5, so long as it does not interfere with the use of the lake by others. One of the primary reasons for extending a pier any substantial distance into a lake is to permit boat owners to moor and launch their boats in areas of navigable water. Thus, any extension of a pier beyond the point required for the mooring and launching of the boats might be considered unreasonable.

"The reasonableness determination will additionally depend on facts such as the normal water level of the lake, the number of riparian owners on any one tract, the purpose of the pier, and the statutory consideration of the effect on others who use the waters of Bass Lake. [Citations omitted] This determination should be decided on the basis of the facts and circumstances of each particular case so that the court can treat each affected riparian owner equitably.

"The Zapffes next make the argument that a non-riparian owner such as Srbeny is prohibited from maintaining a pier or boat moorings in the lake bed under [the Lakes Preservation Act]. This argument must fall for the reason that the Zapffes do not have

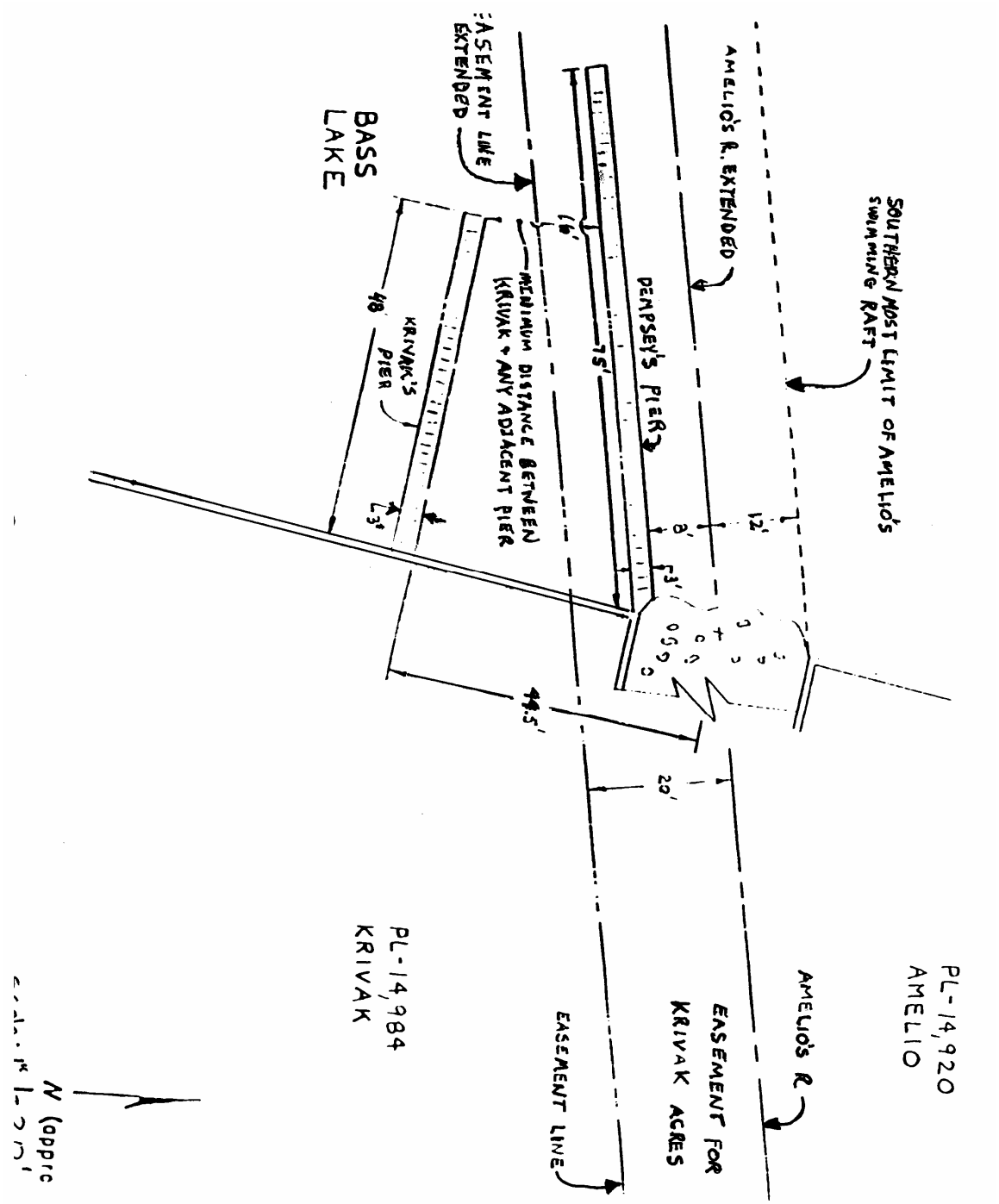
standing to enforce these statutes…. The state has full power and control of all the public freshwater lakes in Indiana [under the Lakes Preservation Act]. We express no opinion on whether Srbeny's boat moorings encroach upon public rights in the waters of Bass Lake, as that question is not before this court." *Zapffe* at p. 181.

***Krivak v. DNR, Dempsey, Lenzen, and Amelio*, 6 Caddnar 176 (1994):**

"The Department authorizes the placement of temporary piers [under a general permit] where the pier meets each of a series of conditions set forth in [rule]. [Page (VI 177) begins] Where the temporary pier does not satisfy any of those conditions, however, a permit is required. One of the conditions is set forth in 310 IAC 6-2-14 (a)(9),with the effect that a permit is required if the temporary pier is objected to by an affected person. Since the subject permit [on Bass Lake] was objected to by an affected person, a permit was required for the Krivak temporary pier." *Krivak* at p. 177 and 178.

"The onshore boundaries of a riparian tract extend into the lake in a line perpendicular to the shoreline, where the shoreline approximates a straight line. *Bath v. Courts* (1984) as cited in *Zapffe*. *Bath* is not directly applicable to this case, however, because the onshore boundaries of the property owners approach the shoreline at other than a perpendicular. *Bath* was itself founded upon a Wisconsin decision, *Nosek v. Stryker*; and, as agreed by the parties, *Nosek* is persuasive. A riparian owner along a lake shall cause pier placement (or 'wharf out') in the most direct manner to the nearest water that can be navigated. *Nosek* and 1 WATERS AND WATER RIGHTS section 6.01 (a) (2), footnote 138.

"Where, as in this case, the onshore boundaries of the property owners are approximately parallel to one another, and nearly but not exactly perpendicular to the shoreline, the most direct and expedient manner for pier placement is at the same angle as the onshore boundaries of the neighbors. The subject permit as given initial determination by the Department is as the same angle as the onshore boundaries of the neighbors and meets the spirit and intent of *Nosek*. The subject permit should be affirmed as set forth in Exhibit 'A' and as conditioned by the Department in its initial determination."



Piering v. Ryan and Caso, 9 Caddnar 123 (2003):

"In Hoosier vernacular, the terms 'dock', 'pier', and even 'slip' and 'wharf', are used almost interchangeably. The Natural Resources Commission recently observed: 'A "pier" is a long narrow structure extending from the shore into a body of water and used

as a landing place for boats or used for recreational purposes. A "dock" is a slip or waterway that is between two piers or cut into the land for the berthing of boats.' *Snyder, et al. v. Linder, et al.*, 9 Caddnar 45, 49 (2002) citing Glossary, 6 WATERS AND WATER RIGHTS, pp. 904 and 929 (The Michie Company 1991, 1994 Replacement). Although the name given is probably of little significance, for clarity and consistency, the definitions applied in the *Snyder* decision are also applied here." *Piering* at p. 130 and p. 131.

"In establishing a 'public trust' on public freshwater lakes, the Indiana General Assembly invoked the 'public trust doctrine' that has historic application to navigable waters. Rights granted by the 'public trust doctrine' include boating, bathing, swimming, and similar activities. *State v. Oliver*, 727 A.2d 491, 320 N.J. Super. 405 (N.J. Super. A.D. 1999). The public trust doctrine assures that the Respondents cannot exclude the general public from these uses; the rights of the Claimants are certainly no less than those of the general public. A 'reasonableness' test is used to accommodate the diverse characteristics of Indiana's public freshwater lakes. On public trust waters, that test weighs the interests of competing riparian owners, as well as those of the general public. *Zapffe v. Srbeny*, 587 N.E.2d 177 (Ind. Ct. App. 1992). The 'reasonableness' test must be considered in the context of the Lakes Preservation Act and any other pertinent state statutes. As provided in IC 14-15-3-17(a), a 'person operating a motorboat may not approach or pass within two hundred (200) feet of the shore line of a lake or channel of the lake...except for the purpose of trolling or for the purpose of approaching or leaving a dock, pier, or wharf or the shore of the lake....'

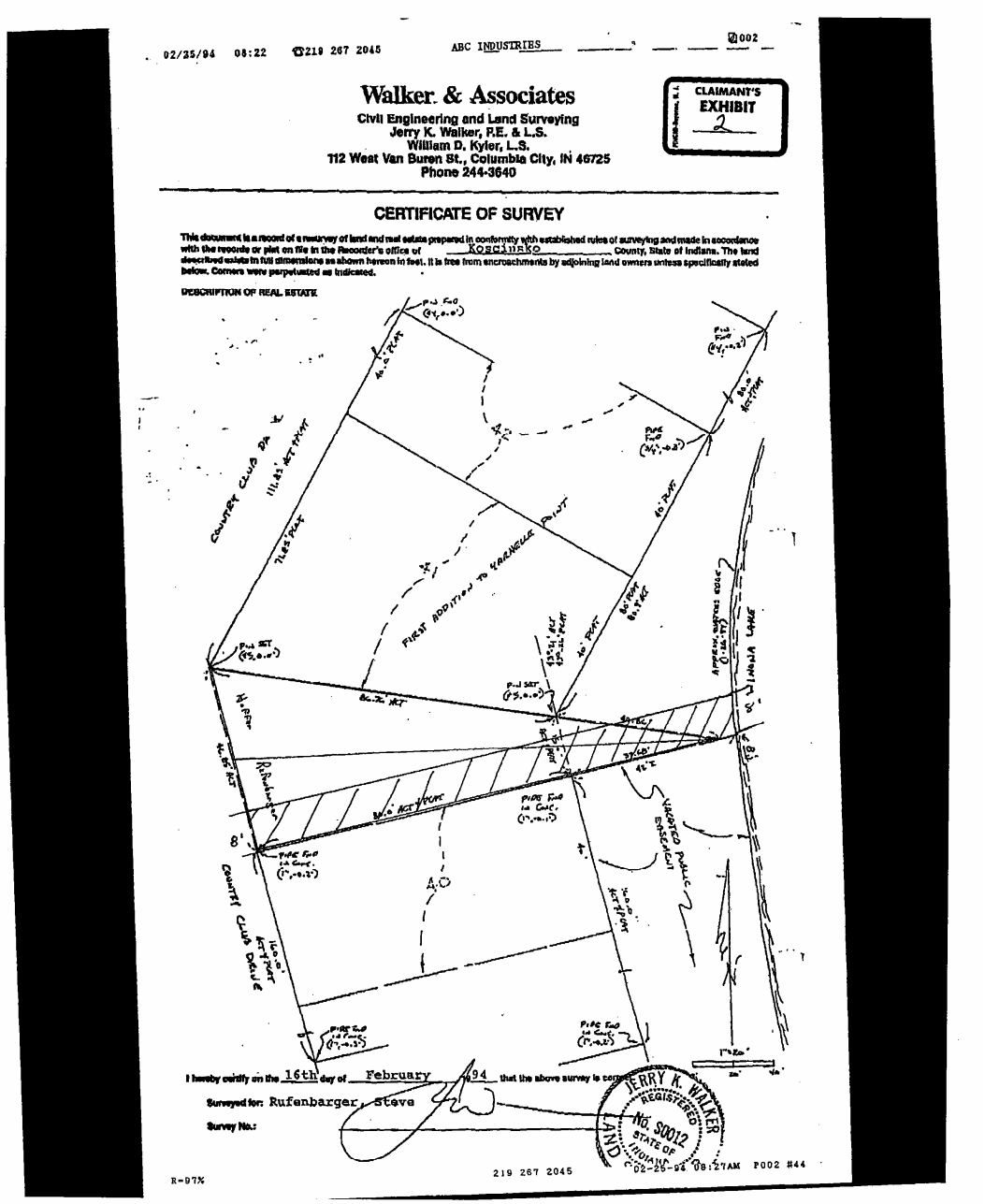
Similarly to Indiana, Michigan uses a 'reasonableness' test to govern the interests among riparian owners on inland lakes. The surface may be used for boating, swimming, fishing, and similar purposes as long as they do not interfere with reasonable uses by other riparian owners. In applying the 'reasonableness' test, Michigan has determined use of a pier may be limited to loading and unloading a boat, if the limitation is needed to allocate waters for reasonable use by another riparian owner. *W. Mich. Dock v. Lakeland Inv.,* 534 N.W.2d 212 (Mich. App. 1995). 73. To fully enjoy their riparian rights, the Claimants need ready ingress and egress to their pier and their shoreline. That enjoyment may reasonably require temporary usage of Crooked Lake waters in proximity to their pier, and either east or west of their riparian area, for the purposes loading and unloading a boat. A temporary use of this nature does not unreasonably infringe on the riparian rights of the Respondents and is consistent with the Lakes Preservation Act and IC 14-15-3-17(a). The Claimants do not, however, reasonably require the usage of waters outside the Claimants' riparian area to permanently moor a boat. A usage of this nature would unreasonably interfere with the riparian rights of" others. *Piering* at p. 130.

***Rufenbarger v. Lowe, et al*., 9 Caddnar 150 (2004):**

In *Bath v. Courts*, 459 N.E.2d 72 (Ind. App. 1984), the court noted there was 'no set rule in Indiana for establishing the extension of boundaries into a lake', as between riparians. The court then adopted Wisconsin law as articulated in *Nosek v. Stryker*. Where a shoreline approximates a straight line and where the onshore property boundaries are

perpendicular to the shore, the boundaries are determined by extending the onshore boundaries perpendicular to the shoreline. Riparian rights do not extend to the center of a public freshwater lake. Rather, 'the State of Indiana holds in trust for public use and enjoyment all freshwater lakes.' The opportunity to place a pier is subject to lateral limitation for the enjoyment of other riparians and to perpendicular limitation for the enjoyment of the public. A riparian owner 'may build a pier within the extension of his shore boundaries only so far out as not to interfere with the use of the lake by others.'

In the instant proceeding, the shoreline from the northern boundary of Lot 40 to the southern boundary of Lot 41, is concave viewed from the perspective of those land parcels. The factual context of *Bath* is not repeated, but *Nosek v. Stryker* that is cited favorably in *Bath*, addresses this circumstance. When the shoreline is irregular, and drawing lines at right angles to the shoreline would not accomplish a just apportionment, the boundary lines should divide the available navigable waterfront in proportion to the amount of shoreline of each owner taken according to the general trend of the shore. 19. If the Claimants were to use the extended northern boundary of Lot 40 an excessive distance into Winona Lake, both the public trust and the riparian rights attached to properties northerly from Lot 40 would be violated. The extended boundary of the northern boundary of Lot 40 and the extended boundary of the southern boundary of Lot 41 intersect even before they reach the shoreline. Claimants Exhibit 2. Indeed, the extended northern boundary of Lot 40 would intersect the extended northern boundary of Lot 41 before passing a great distance into Lake Winona. Stated as the general principle of *Bath v. Courts*, the Claimants 'may build a pier within the extension of [their] shore boundaries only so far out as not to interfere with the use of the lake by others.' *Rufenbarger* at p. 152 and 153.



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CLAIMANT'S EXHIBIT 2

CERTIFICATE OF SURVEY

This document is a record of a resurvey of land and real estate prepared in conformity with established rules of surveying and made in accordance with the records or plat on file in the Recorder's office of Koscinsko County, State of Indiana. The land described exists in full dimensions as shown hereon in feet. It is free from encroachments by adjoining land owners unless specifically stated below. Corners were perpetuated as indicated.

DESCRIPTION OF REAL ESTATE

I hereby certify on the 16th day of February 94 that the above survey is correct

Surveyed for: Rufenbarger, Steve

Survey No.:

JERRY K. WALKER REGISTERED No. S0012 STATE OF INDIANA LAND

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French v. Abad, et al. and DNR, 9 Caddnar 176 (2004):

"An aggrieved person may seek administrative review of the placement, pursuant to a general license, of a temporary pier. 312 IAC 11-3-2(a). Where that occurs, the Commission will consider the configuration of the pier and its relationship to other piers and structures. Matters that are considered include the correlative rights of riparian owners (including persons, such as easement holders, who are the beneficiaries of

riparian rights). The public trust is also considered, including the impact of pier placement upon safety, the environment, and the enjoyment of public waters. *Zapffe v. Srbeny*, *Piering v. Ryan and Caso*; and, *Snyder, et al. v. Linder, et al*., 9 Caddnar 45 (2002). A complete resolution of issues may require a professional survey and the application of legal principles to precisely delineate the boundaries of riparian rights lakeward of the shoreline. See *Bath v. Courts*, and *Nosek v. Stryker* applied in *Rufenbarger v. Lowe*. *French* at p. 178.

Barbee Villa Condominium Owners Assoc. v. Shrock, **10 Caddnar 23 (2005):**

"Can a person lawfully moor a boat adjacent to a pier, where the pier is located in the person's riparian area, but where the boat occupies the riparian area of the person's neighbor? No decision of the Indiana Supreme Court, and no reported decision of the Court of Appeals of Indiana, answers this issue. Whether a person can lawfully moor a boat adjacent to a pier, where the pier is located in the person's riparian area, but where the boat occupies the riparian area of a neighbor, is a matter of first impression.

"Four reported decisions offer insights. These are *Bath v. Courts*; *Zapffe v. Srbeny*; *Abbs v. Syracuse*, 655 N.E.2d 114 (Ind. App. 1995); and, *Lake of the Woods v. Ralston*, 748 N.E.2d 396 (Ind. App. 2001). The Baths and the Courts were neighbors owning adjacent land on a public freshwater lake. *Bath* at 73. The Courts wished to build a platform at the end of their pier without interfering with a public pier located on land the opposite direction from the Baths. The Courts angled their pier away from the public pier. In the process, the platform crossed into the riparian area of the Baths. The Court of Appeals concluded, '[R]iparian right owners may build a pier within the extension of [their] shore boundaries only so far out as not to interfere with the use of the lake by others.' A pier or platform that extended into the riparian area of another person was an encroachment. The law 'prohibits encroachments upon the riparian rights of another.'

"In *Zapffe*, the Court of Appeals adopted a '"reasonableness" test' in an attempt to 'accommodate the diverse characteristics of Indiana's numerous [public] freshwater lakes.' The reasonableness test applies to the relationships between riparian owners as well as the relationship between a riparian owner and the public. Riparian owners may exercise rights such as access, swimming, fishing, bathing, and boating subject to the rule of reasonableness. The installation of a pier by a riparian owner is a reasonable use under the Lakes Preservation Act 'so long as it does not interfere with the use of the lake by others... Thus, any extension of a pier beyond the point required for the mooring and launching of boats might be considered unreasonable.' *Zapffe* also reflects that a riparian owner does not have standing to enforce a restriction in the Lakes Preservation Act for an area outside the owner's riparian area. This authority resides in the Department. *Zapfee* at 181.

"Riparian rights are a proprietary interest derived from ownership of the fee title to land that abuts the lake. 'With regard to riparian rights, a riparian owner acquires his rights to

the water from his fee title to the shoreland.' *Abbs* at 115." *Barbee Villa Condominium* at p. 26.

"Riparian rights are now correlative with those of the public, but the Lakes Preservation Act does not eliminate riparian rights. The Lakes Preservation Act is '[p]ublic trust legislation' intended to recognize 'the public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes.' The Court observed that 'Riparian landowners...continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights.' *Lake of the Woods* at 401.

"A person who is not a riparian owner has the lesser interests of the public in another person's riparian area. The public may enjoy natural scenic beauty and recreational values, such as navigation and fishing. Within another person's riparian area, these values are generally temporal. A riparian owner is also entitled to these values but may additionally enjoy the benefits attributable to improvements (such as wharves, piers, and boat stations) as a consequence of the riparian owner's proprietary interests. Within the riparian area, and with due consideration for the public trust, the riparian owner is entitled to those values that are more enduring, as well as those that are temporal. Within a person's riparian area, the person has standing to seek protection from encroachment for those values attributable to the person's enduring proprietary interests, such as those pertaining to the placement of wharves, piers, and boat stations. If a person is not the riparian owner of the area where an encroachment takes place, the person may lack standing to complain, although the Department may seek to secure the values protected by the Lakes Preservation Act. *Zapffe* at 181.

"A boat upon the water constitutes a lake usage that is exclusive or nearly so. When actively used for transportation, fishing, hunting, or any of a number of other recreational activities, this exclusive usage is temporal. When a boat is moored to a pier, the consequences of the usage are similar to those of the pier, and the boat essentially becomes an extension of the pier. Mooring a boat is an exercise of proprietary rights and would typically be unreasonable in the same locations where a pier would be unreasonable. If the location of a pier were to violate the 'reasonableness' test, typically a boat moored in that same location would also violate the 'reasonableness' test. Extraordinary facts might be imagined where a different result would follow. For example, the 'reasonableness' test might be satisfied if one riparian owner granted a deed to another riparian owner, and mooring a boat on the riparian waters of the other implemented the deed's apparent intent. Another example might be if the facts demonstrated the riparian owner suffered no interference to riparian rights.

"An issue similar to the one for consideration here was addressed by the Commission in *Piering v. Ryan and Caso*. 'Similarly to Indiana, Michigan uses a "reasonableness" test to govern the interests among riparian owners on inland lakes. The surface may be used for boating, swimming, fishing, and similar purposes as long as they do not interfere with reasonable uses by other riparian owners. In applying the "reasonableness" test, Michigan has determined use of a pier may be limited to loading and unloading a boat, if

the limitation is needed to allocate waters for reasonable use by another riparian owner. *W. Mich. Dock v. Lakeland Inv*., 534 N.W.2d 212 (Mich. App. 1995).' The Commission determined that to 'fully enjoy their riparian rights, the Claimants need ready ingress and egress to their pier and their shoreline. That enjoyment may reasonably require temporary usage of the waters of a public freshwater lake, located in the riparian areas of the Claimants' neighbors, 'for the purposes loading and unloading a boat. A temporary use of this nature does not unreasonably infringe on the riparian rights of the Respondents and is consistent with the Lakes Preservation Act....' The Commission determined, however, that usage by the Claimants of their neighbors' riparian areas 'to permanently moor a boat' would violate the 'reasonableness' test. 'A usage of this nature would unreasonably interfere with [the neighbors'] riparian rights.' The facts are not in material dispute. Shrock cannot lawfully moor a boat on the western side of his pier and within the riparian area of Barbee Villa COA. Doing so prevents Barbee Villa COA from navigating a watercraft between its boat and Shrock's boat and toward the lakeward end of Barbee Villa COA's pier. Doing so is an unreasonable infringement upon Barbee Villa COA's riparian rights. The Conservation Officer's order to Shrock to remove his boat should be implemented by prohibiting future mooring by Shrock, or by other persons using Shrock's pier, at that location." *Barbee Villa Condominium* at p. 26 and p. 27.

***Roberts v. Beachview Properties, LLC, Harbour Condominiums, and DNR*, 10 Caddnar 125 (2005); affirmed on judicial review by Marshall Superior Court (50D01-0508-MI-05) on January 25, 2007.**

"Lake Maxinkuckee is a 'public freshwater lake' governed by the provisions of the Lakes Preservation Act (Ind. Code 14-26-2-1, et seq.) and rules promulgated thereunder and found at 312 IAC 11. The waters of Lake Maxinkuckee are 'public waters' (Ind. Code. 14-8-2-226) whose use is governed, in part, by the Watercraft Operations Act (Ind. Code 14-15-3-1, et seq.) and rules promulgated thereunder and found at 312 IAC 5.

"For consideration is a dispute involving the propriety of the placement of seasonal or temporary piers at a site on the west side of Lake Maxinkuckee and, specifically, within what 'riparian zone' the parties' piers may be placed. Although several provisions of the Lakes Preservation Act and the Watercraft Operations Act are relevant to pier placement on Lake Maxinkuckee, the most pertinent is Ind. Code 14-26-2-23. This section provides for dispute resolution and authorizes the Commission to adopt rules for the 'placement of a temporary or permanent structure . . . over, along, or within a shoreline or waterline' of a public freshwater lake." *Roberts* at p. 137.

"An aggrieved person may seek administrative review of the placement, pursuant to a general license, of a temporary pier. 312 IAC 11-3-2(a). When that occurs, the Commission will consider the configuration of the pier and its relationship to other piers and structures. Matters that are considered include the correlative rights of riparian owners (including persons, such as easement holders, who are the beneficiaries of riparian rights). The public trust is also considered, including the impact of pier

placement upon safety, the environment, and the enjoyment of public waters. [Citations omitted] *Roberts* at p. 138.

"'[T]he State of Indiana holds in trust for public use and enjoyment all freshwater lakes. The opportunity to place a pier is subject to lateral limitations of the enjoyment of other riparians and to perpendicular limitation for the enjoyment of the public.' The Lakes Preservation Act is '[p]ublic trust legislation' intended to recognize 'the public's right to preserve the natural scenic beauty of our lakes and recreational values upon the lakes.' *Sedberry v. DNR*, 10 Caddnar14 (2005), citing *Lake of the Woods v. Ralston*, 748 N.E.2d 396 (Ind. App. 2001). "Riparian landowners . . . continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must now be balances with the public's rights." [Additional citations omitted]

"A complete resolution of issues may require a professional survey and the application of legal principles to precisely delineate the boundaries of riparian rights lakeward of the shoreline. [Citations omitted] The areas within which the parties enjoy riparian rights are known as the 'riparian zone.' Riparian rights within such a zone are subject to regulation under Ind. Code 14-26-2, including the public trust doctrine. A riparian owner 'may build a pier within the extension of his shore boundaries only so far as not to interfere with the use of the lake by others.' The parties must not place any structure, temporary or permanent, outside the area defined as their riparian zone. The Commission has, on multiple occasions, defined riparian zones by extending lines perpendicular into the Lake. See, e.g., *Piering v. Ryan and Caso*. The Commission has not previously applied, and no Indiana court has adopted, the 'long lake' method. Placement of piers in a position that goes to the most direct point of navigable water is preferred if the riparian rights of the public or other owners would not thereby be jeopardized." *Roberts* at p. 138 and p. 139.

"The *Nosek* court established three methods for determining riparian rights. First, as was the factual scenario in *Bath*, where the course of a shoreline approximates a straight line and the onshore property division lines are at right angles with the shore, the boundaries extending into the lake are determined by simply extending onshore property division lines into the lake. Second, when boundary lines on lakeshore property are not at right angles with the shore but approach the shore at obtuse or acute angles, it is inappropriate to apportion riparian tracts by extending onshore boundaries. Instead, division lines should be drawn in a straight line and at a right angle to the shoreline without respect to the onshore boundaries. Third, when the shoreline of a lake is irregular and it is impossible to draw lines at right angles to the shore to accomplish a just apportionment of adjacent landowners' riparian rights, then boundary lines should be run in such a way as to divide the total navigable waterfront in proportion to the actual shoreline of each owner taken according to the general trend of the shore." *Roberts* at p 139.

"The appropriate approach to be applied in this case in the interests of safety, navigability, equity, and just apportionment of riparian rights for the parties to this matter and to their adjoining neighbors is *Nosek's* right angle to the shoreline, or perpendicular to the shoreline, approach. Thus, each of the parties' riparian zones shall be bounded by two lines as demonstrated in Exhibit 19, extending in a generally easterly direction and

perpendicular to the relevant portions of the shoreline of Lake Maxinkuckee, which commences at the two points formed where the land described above intersects with the shoreline of Lake Maxinkuckee.

"Of note are the facts that, in 2004 Beachview pier's was placed approximately perpendicular to the shoreline; and Harbour's piers have historically been placed approximately five degrees from perpendicular to the shoreline; but Roberts' pier has not been perpendicular to the shoreline and has been angled northward. Also of note are the facts that Harbour's northern neighbors' piers historically have been perpendicular to the shoreline, and the Roberts' southern neighbors' piers have been perpendicular to the shoreline.

"The Roberts' application suggests that the first method for determining riparian rights articulated by *Nosek* should be applied here. However, unlike the circumstances noted in *Nosek*, and present in *Bath*, the property lines at issue in this case do not meet the shoreline at right angles. The property lines at issue are acute or obtuse angles. The Roberts' southern property line comes the closest to approximating a right angle with the shoreline. However, none of the other property lines at issue between the three property owners approximate a right angle. Indeed, the Roberts' property lines, contrary to the property lines of the other owners, run in opposite directions. As a result, were the property lines extended as the Roberts request in their application, they would benefit at the expense of the other parties. This is not equity. As a result, this approach is rejected.

"In addition, if the piers were placed as the Roberts request in their 2004 application, the Roberts' northern pier would affect Beachview's ingress and egress, as well as the ingress and egress of Beachview's boating friends. Likewise, if Beachview's pier was placed at the angle requested under Beachview's 'long lake' method of defining riparian zones, the placement would affect Harbour's ingress and egress and the ingress and egress of its boating friends. Harbour's northern riparian line and northern pier also would cross the historic placement of the Martindales' pier and could result in a domino effect with four northern neighbors. *Roberts* at p. 140.

"No party advocates the adoption of the third method applied in *Nosek*, which Lieutenant Sullivan defined as the 'proportional method'. Indeed, the proportional method is not applicable here. The parties have stipulated that Lake Maxinkuckee is essentially oval and that the properties at issue are not located within a cove or unusual configuration. Moreover, as Lieutenant Sullivan, Lieutenant Taylor, Lake Maxinkuckee aerial photograph (Exhibit 19) and other witnesses explained, the shorelines are not irregular and are approximately straight, and it is possible to apply *Nosek's* second method of drawing boundaries perpendicular to the shoreline and accomplish just apportionment Moreover, the proportional method applied in *Nosek* relies on a rule of law well developed in Wisconsin law known as the 'line of navigability.' This rule has not been imported into Indiana law to date.

Beachview advocates that the Court follow the 'long lake' method, and the Roberts seemed to advocate at the hearing the same method, as depicted in Exhibits 16B and 20,

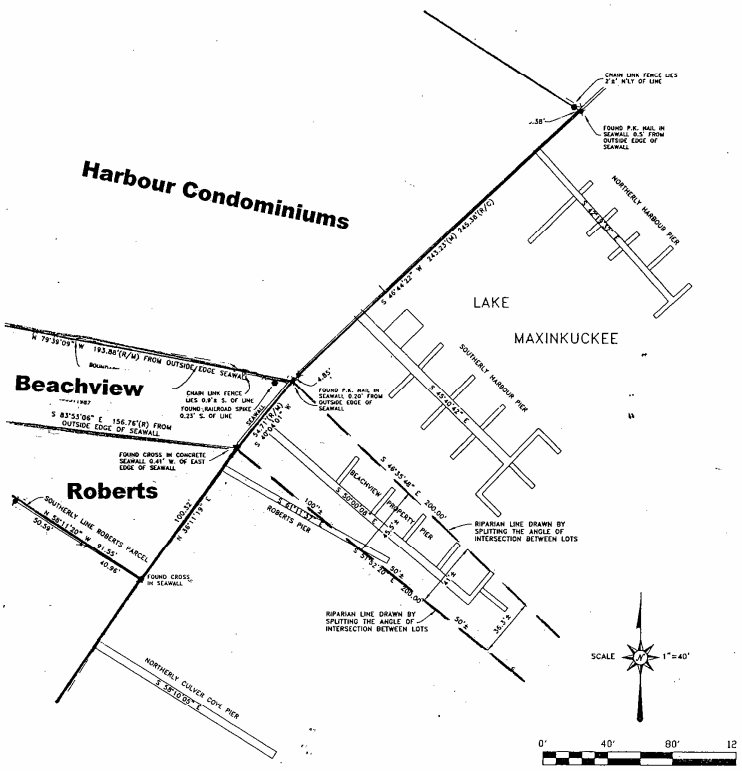
both of which are demonstrative exhibits only and do not set out exact riparian boundaries. The 'long lake' method has not been adopted by any Indiana court or the Commission. Moreover, the method applies to accretion or avulsion cases only. The parties agree that this is not an accretion or avulsion case. The 'long lake' method does not consider the use, safety, or public trust, and it is inconsistent with Indiana law, which establishes that a lake owner's riparian zone does not extend to the middle of the lake. *Bath v. Courts*. The 'long lake' or 'center of the lake' theory promoted by Beachview is contrary to Indiana law and will not be applied in this matter. 'One point is well-settled . . . the boundaries of riparian property do not extend to the middle of the lake.' *Zapffe v. Srbeny*, citing *Bath v. Courts*; and *Stoner v. Rice*, 121 Ind. 51, 22 N.E.968 (Ind. 1889). In *Bath*, the Court applied *Stoner* as the basis for its rejection of the method of extending riparian rights from the shoreline to the middle of a riverbed when determining riparian (actually, littoral) rights on an enclosed lake, because application of this rule to an enclosed lake would exclude some owners from title to any of the waterbed. *Id*. The *Bath* and *Stoner* courts further based their ruling because earlier determinations concerning riparian rights on rivers 'depended to a great extent upon whether the lake was navigable', and Indiana 'statutory law [including the Lakes Preservation Act] renders such determination unnecessary'. *Id*. There also is no evidence that the long lake method would increase the safety or navigability of Lake Maxinkuckee, or would otherwise better protect the public trust doctrine than the perpendicular approach outlined in herein." *Roberts* at p. 140.

"In seeking a ruling which addresses 'backup zones' and shared spaces, the parties have invited this judge to consider temporal factors of watercraft choice and placement of watercraft on the respective piers in making a determination of riparian rights. A boat upon the water constitutes a lake usage that is exclusive or nearly so. When actively used for transportation, fishing, hunting, or any of a number of other recreational activities, this exclusive usage is temporal. When a boat is moored to a pier, the consequences of the usage are similar to those of the pier, and the boat essentially becomes an extension of the pier. Mooring a boat is an exercise of proprietary rights and would typically be unreasonable in the same locations where a pier would be unreasonable. If the location of a pier were to violate the 'reasonableness' test, typically a boat moored in that same location would also violate the 'reasonableness' test.

"Similarly to Indiana, Michigan uses a 'reasonableness' test to govern the interests among riparian owners on inland lakes. The surface may be used for boating, swimming, fishing and similar purposes as long as they do not interfere with reasonable uses by other riparian owners. In applying the 'reasonableness' test, Michigan has determined use of a pier may be limited to loading and unloading a boat, if the limitation is needed to allocate waters for reasonable use by another riparian owner. *Barbee Villa Condominium Owners Ass'n v. Shrock* citing *Piering v. Ryan and Caso*, and *West Michigan Dock v. Lakeland Inv*. In *Piering* and in *Barbee Villa*, the Commission determined that 'to fully enjoy their riparian rights, the Claimants need ready ingress and egress to their pier and their shoreline. That enjoyment any reasonably require temporary usage of the waters of a public freshwater lake, located in the riparian areas of . . . neighbors, 'for the purposes of loading and unloading a boat. The temporary use of this nature does not reasonably

infringe upon . . . riparian rights . . . and is consistent with the Lakes Preservation Act', while permanent moorage would violate the 'reasonableness' test. *Id*." *Roberts* at p. 140 and p. 141.

"Any theory advocated by the parties that the Commission should adjust its determination of the parties' respective areas of riparian rights based upon the placement of watercraft of specific lengths on particular sides of the parties piers would place an unreasonable burden upon the Department in its administration of the Lakes Preservation Act and relevant rules, as watercraft choice and placement is too temporal of a factor to be determined in a pier permit. Instead, relevant watercraft operation laws require the parties, and any persons enjoying the recreational and navigational qualities of any lake, to adjust their conduct, watercraft use and placement to circumstances exigent at time of use. The parties may enter into written agreements among themselves to allow usage of a party's riparian boundaries by another party, so long as such agreement and usage does not affect those who are not parties to such an agreement, including the public." *Roberts* at p. 141.



Sims, et al. v. Outlook Cove, LLC and Outlook Cove Homeowners Ass'n, 10 Caddnar 258 (2006):

"Riparian doctrine is the system of law dominant in Great Britain and the eastern United States, including Indiana. Under the doctrine, the owners of lands along the banks of a river, stream, or lake, have the right to reasonable use of the waters and a correlative right

protecting against unreasonable use by others that substantially diminishes the quantity or quality of water. Riparian rights are the rights accompanying the ownership of land along the banks of a river, stream, or lake. 6 WATERS AND WATER RIGHTS 345 and 935 (The Michie Company 1991).

"The Lakes Preservation Act authorizes a person who is the 'owner of land abutting a public freshwater lake' to apply to the DNR for a license to change the shoreline or alter the bed. The DNR may issue the license 'after investigating the merits of the application.' IC 14-26-2-9. By implication, a person who is not an owner of land abutting a public freshwater lake does not qualify to seek a license under the Lakes Preservation Act for near shore activities.

"Within this statutory parameter, the Commission adopted a rule definition in 1990 for "riparian owner" that provided a shorthand description of the concept that is in harmony with the Lakes Preservation Act and the common law. The definition was originally adopted as 310 IAC 6-2-12 and has since been recodified at 312 IAC 11-2-19:

> "Riparian owner" means the owner of land, or the owner of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake. The term includes a littoral owner.

Sims at p. 267.

"IC 14-26-2-23(3) directs the Commission to provide, through mediation or administrative review, for the resolution of disputes among riparian owners or between a riparian owner and the DNR

"An aggrieved person may seek administrative review of the placement of a temporary pier. 312 IAC 11-3-2(a). Where that occurs, the Commission would consider the configuration of the pier and its relationship to other piers and structures. Matters that are considered include the correlative rights of riparian owners. The public trust is also considered, including the impact of pier placement upon safety, the environment, and the enjoyment of public waters. A complete resolution of issues may require a professional survey and the application of legal principles to precisely delineate the boundaries of riparian rights lakeward of the shoreline. Exhaustive inquiry into these principles may be required to bring a full resolution. *Roberts v. Beachview Properties, LLC, et al*., 9 Caddnar 163, 165 (2004).

"The dispute between and among the parties in this proceeding is one involving competing interests among the adjacent riparian owners and the DNR. The Commission has the requisite jurisdiction over the person of the parties and over the subject matter to determine these facts following a hearing and to render a final agency determination." *Sims* at p. 273 and 274.

"Much of the testimony was focused on promoting various methods for defining and apportioning riparian zones. Three professional land surveyors testified, each of whom is

licensed in Indiana. The testimony of each was forthright, and each had extensive experience in the profession.

"John Saylor, the land surveyor called by the Simses, testified in support of what has been called the 'hub and spoke' method. Charles Hendricks, the land surveyor called by Outlook Cove, LLC and Ass'n, testified in support of what has been called the 'extended lot line' method. Robert Wilkinson, the land surveyor called by the DNR, testified in support of what has been called the 'long lake' method.

"Outlook Cove, LLC and Ass'n cite *Bath v. Courts*, 459 N.E.2d 72 (Ind. App. 1984) in support of the extended lot line method. The Court of Appeals noted in *Bath* that between riparian owners there was 'no set rule in Indiana for establishing the extension of boundaries into a lake'. The court then adopted Wisconsin law as articulated in *Nosek v. Stryker*, 309 N.W.2d 868. Where a shoreline approximates a straight line and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore boundaries perpendicular to the shoreline. Riparian rights do not extend to the center of a public freshwater lake. Rather, 'the State of Indiana holds in trust for public use and enjoyment all freshwater lakes.' *Rufenbarger v. Lowe*, 9 Caddnar 150, 152.

"As reflected by the Wisconsin Supreme Court in *Nosek*, the extended lot line method is appropriate in 'the least complicated situation, where the course of the shore approximates a straight line and the onshore property division lines are at right angles with the shore, [in which case] the boundaries are determined by simply extending the onshore property division into the lake.' *Nosek* at 870.

"The extended lot line method is not appropriate in all circumstances, as articulated by *Nosek* and as applied by the Commission in *Rufenbarger* and in *Roberts v. Beachview Properties*, LLC, et al. at 10 Caddnar 125 (2005).

"Currently, the Commission has no reported guidance from the Indiana judiciary other than the *Bath* decision. Neither has the Commission elected to adopt rules or to implement a nonrule policy document to establish standards that might assist in determining riparian boundaries. In the absence of guidance other than *Bath*, the extended lot line method should be applied unless doing so would be demonstrably inequitable.

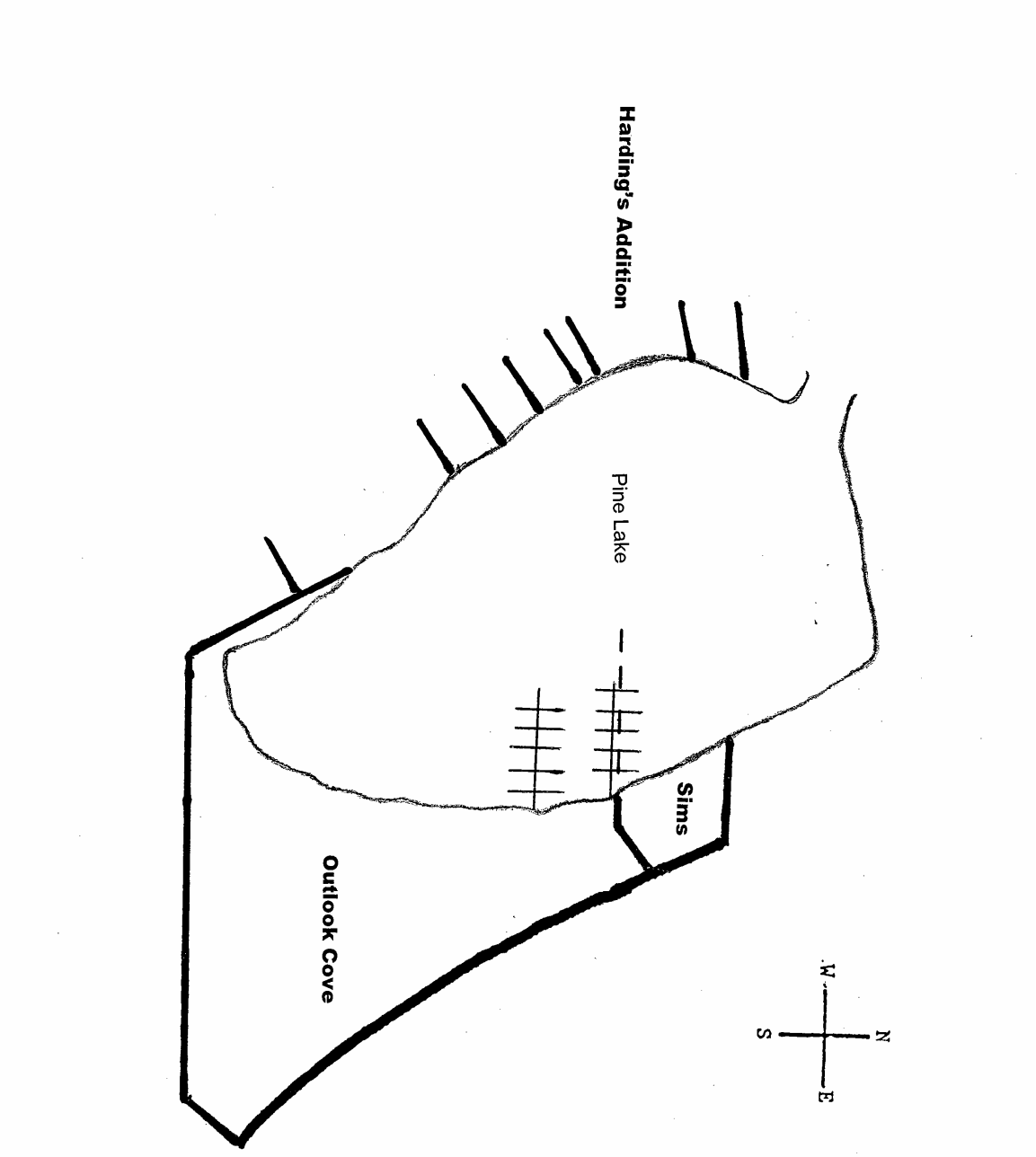
"Robert Wilkinson testified that while the long lake method was preferable, the extended lot line method would work in this proceeding. Similarly, George Bowman, Assistant Director for the DNR's Division of Water, testified through a deposition that the agency looks 'for ways where they basically were in line with their property boundaries, so that they didn't angle out across extensions of property boundaries and so forth. Generally, we'd be looking for something that came pretty much straight out and was perpendicular to your shoreline....' Stipulated Deposition of George Curtis Bowman (March 8, 2006).

"Both the hub and spoke method and the long lake method offer promise for the achievement of equitable delineations of riparian boundaries, but the Commission's use of either could not have been predicted by the parties in advance of the adjudication. Application of the extended lot line method is here an equitable approach and should be implemented to delineate the riparian boundary shared by the Simses and Outlook Cove, LLC and Ass'n.

"First Sgt. Tim Theriac of the DNR's Division of Law Enforcement in District 10, which includes Pine Lake, testified that safety is his Division's paramount concern. He testified that a minimum of ten feet should be maintained between piers, but a separation of 20 feet is preferred. Finally, he testified that Outlook Cove is not large enough to lawfully accommodate high-speed watercraft.

"In support of navigational safety, no pier, pier extension, boat lift, similar structure or moored boat should be located closer than ten feet from the riparian boundary formed by the extension of the common boundary between the Simses' realty and the Outlook Cove, LLC and Ass'n's realty.

"No finding is made as to the placement of piers within the riparian areas of the Simses or of Outlook Cove, LLC and Ass'n, other than as set forth in the following order, except that any pier must comply with the Lakes Preservation Act and 312 IAC 11." *Sims* at p. 278 and 279.



Belcher and Belcher v. Yager-Rosales, 11 Caddnar 79 (2007):

"Quiet Harbour Channel is approximately 58 feet wide" and forms a portion of Lake Wawasee, a public freshwater lake in Kosciusko County. *Belcher* at p. 80.

"On a public freshwater lake, a myriad of other issues may be presented concerning the proprietary relationships between neighboring riparian owners or between a riparian owner and the DNR where the DNR is fiduciary for the public trust. A party might present facts to show the existence of a binding agreement with the other party, adverse possession, a prescriptive easement, or some other event of legal import that would determine riparian rights. Absent a showing of this consequence, the history of which pier or which boat was placed in which configuration, and by whom a pier or boat was placed, does not present a material fact. First in time first in right is not a viable factual or legal principle for determining the rights of riparian owners or those of the public on the waters of public freshwater lakes. *Barbee Villa Condominium Owners Assoc. v. Shrock*.

"Riparian rights are a proprietary interest derived from ownership of the fee title to land that abuts the lake. 'With regard to riparian rights, a riparian owner acquires his rights to the water from his fee title to the shoreland.' *Abbs v. Syracuse*.

"In *Zapffe v. Srbeny*, the Court of Appeals adopted a '"reasonableness" test' in an attempt to "accommodate the diverse characteristics of Indiana's numerous [public] freshwater lakes." The reasonableness test applies to the relationships between riparian owners as well as the relationship between a riparian owner and the public. Riparian owners may exercise rights such as access, swimming, fishing, bathing, and boating subject to the rule of reasonableness. The installation of a pier by a riparian owner is a reasonable use under the Lakes Preservation Act 'so long as it does not interfere with the use of the lake by others…'

"The Court of Appeals concluded in *Bath v. Courts* that 'riparian right owners may build a pier within the extension of [their] shore boundaries only so far out as not to interfere with the use of the lake by others.' A pier or platform that extended into the riparian area of another person was an encroachment. The law 'prohibits encroachments upon the riparian rights of another.'

"The *Bath* decision also adopted the first tier of a three-tiered approach to pier configuration principles recognized in Wisconsin law at *Nosek v. Stryker.* The first tier supports the principle that where a shoreline approximates a straight line, and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore boundaries perpendicular to the shoreline. Cited with approval in *Borsellino v. Kole*, 168 Wisc. 2d 611, 484 N.W.2d 564 (Wisc. App. 1992) and by the Commission in *Rufenbarger v. Lowe, et al.* and *Sims v. Outlook Cove, LLC, et al*.

"The first-tier approach of *Nosek,* as approved for Indiana in *Bath,* is inapplicable where the property boundaries do not approach the shoreline or water line at a perpendicular, or where the shoreline is concave as viewed from the land, forming an inlet or bay. The Commission summarized the three-tiered approach of *Nosek* in *Roberts v. Beachview Properties, LLC, Harbour Condominiums, and DNR*:

> The *Nosek* court established three methods for determining riparian rights. First, as was the factual scenario in *Bath*, where the course of a shoreline approximates a straight line and the onshore property division lines are at right angles with the shore, the boundaries extending into the lake are determined by simply extending onshore property division lines into the lake. Second, when boundary lines on lakeshore property are not at right angles with the shore but approach the shore at obtuse or acute angles, it is inappropriate to apportion riparian tracts by extending onshore boundaries. Instead, division lines should be drawn in a straight line and at a right angle to the shoreline without respect to the onshore boundaries. Third, when the shoreline of a lake is irregular and it is impossible to draw lines at right angles to the shore to accomplish a just apportionment of adjacent landowners' riparian rights, then boundary lines should be run in such a way as to divide the total navigable waterfront in proportion to the actual shoreline of each owner taken according to the general trend of the shore.

Upon the facts in *Roberts*, which did not comport with *Bath* but which are also unlike those of the instant proceeding, the Commission applied the second-tier approach from *Nosek* to delineate riparian zones among the parties.

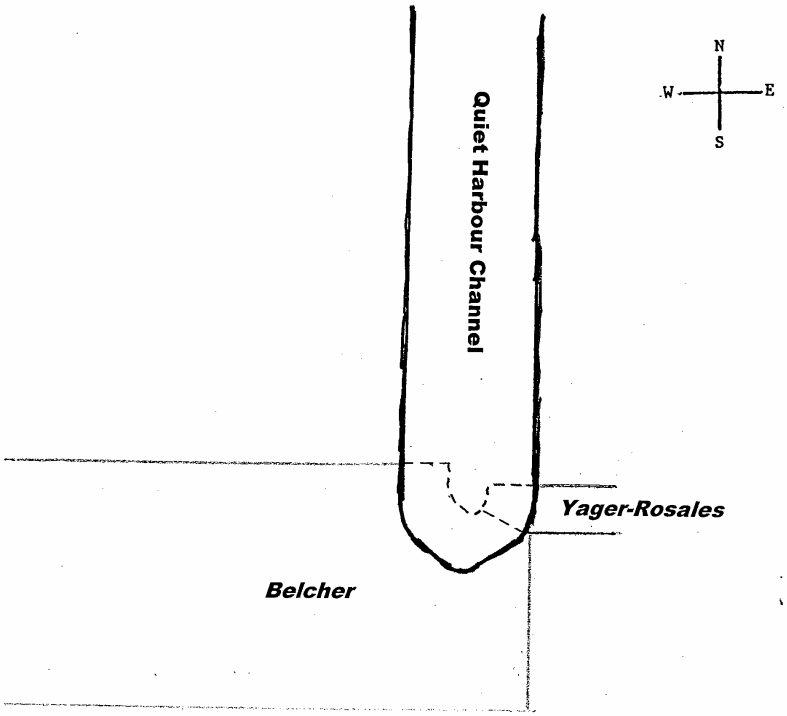
"The first-tier (*Bath*) approach or the second-tier (*Roberts*) approach may have utility to determining riparian zones for pier configurations among neighbors on the same side of a manmade channel, at least where pier placement would not interfere with navigation or with the usage of riparian owners on the opposite side of the channel. These approaches generally would not have utility to determining riparian zones between neighbors who share a shoreline at the end of a narrow manmade channel. Under the first-tier approach or the second-tier approach, the end of a manmade channel is likely to present a severe concave curvature where competing landowners would have claims to the same water for their respective riparian zones.

"The first-tier approach and second-tier approach are inapplicable to the instant proceeding because the Belchers' real estate and the Yager-Rosales's real estate border approximately at the corner of the end of a narrow manmade channel. Both the Belchers and Yager-Rosales could individually lay claim to the lion's share of the end of Quiet Harbour Channel based on an insular view from their respective shorelines. Also, the Yager-Rosales argument is rejected that filling lake space with a boat is a superior use to leaving the space unoccupied. Even setting aside the public trust established by the Lakes Preservation Act, a riparian owner has as much right to enjoy the unencumbered waters of a lake as to enjoy those waters for mooring a boat.

"What here would provide the shoreline usage to the nearest of the respective riparian owners as anticipated by *Abbs v. Syracuse*, and that would best satisfy the reasonableness test as anticipated by *Zapffe v. Srbeny*, is an implementation of the third-tier approach. The shoreline of Quiet Harbour Channel at the property line stake described in Finding 15 is irregular, and it is impossible to draw a line at right angles to the shore to accomplish a just apportionment of adjacent landowners' riparian rights. Drawing a right angle from a point at the corner of a narrow channel is almost an absurdity. One result is achieved if the end of the channel is used as the measure for the right angle, and another

fundamentally different result is achieved if the side of the channel is used as the measure for the right angle. Neither result would be a just apportionment.

"The boundary line in this proceeding should be run in such a way as to divide the total navigable waterfront in approximate proportion to the actual shoreline of the Belchers and Yager Rosales. A just apportionment would be accomplished by running a line northwest from the property line stake. The line should terminate 24 feet lakeward from the waterline or shoreline, and the area that commences beyond this termination point should be reserved for navigation. A second limitation on the Belchers and Yager-Rosales should be that no pier or boat should be located more than 17 feet, measured perpendicularly, from a shoreline or water line of the side or of the end of the Quiet Harbour Channel." *Belcher* at pp. 82-85.



Pipp v. Spitler, *et al*., 11 Caddnar 39 (2007):

"In anticipation of the public hearing, the parties stipulated that the historical usage of the subject public way, as extended into Lake Wawasee, is perpendicular to the shoreline or water line. This usage is generally distinguished from any other angle that public usage might be exercised as described from the shoreline and into the Lake. In the stipulation,

this usage was specifically distinguished from the angle that would be formed by an extension of the boundaries of the subject public way in a straight line beyond their intersections with the shoreline or water line and into Lake Wawasee. The area of this usage within Lake Wawasee is referenced as the 'channel'. Prior to the public hearing, the parties' stipulation concerning the channel was approved by the administrative law judge. Evidence received at hearing was consistent with the stipulation, and its approval is affirmed.

"In support of clarity and durability, the following specifications shall be applied in determining the geographic boundaries of the channel: The boundaries of the subject public way are formed by two lines that are approximately 24 feet apart. The channel commences with the two points that are established by these lines at their respective intersections with the shoreline or water line of Lake Wawasee. Based upon a straight line formed between the two points, a perpendicular line from each of the points is extended into Lake Wawasee. The resulting two lines are parallel to each other and form the boundaries of the channel. These two lines terminate 200 feet from the shoreline or water line.

"In determining the lawful usage of adjacent waters, the purpose of a terrestrial access to those waters must be determined. An easement may provide a dominant estate with the opportunity to construct a pier or other improvement if the servient estate was intended to be so burdened. A grant of authority may be express, implied or acquired through prescription. Where the purpose of a grant is ambiguous, there 'must be an inquiry into the surrounding facts and circumstances to determine' its purpose. A grant providing "access to the lake" is sufficiently ambiguous to require inquiry into intent. *Klotz v. Horn*, 558 N.E.2d 1096, 1099 (Ind. 1990), citing also, *Brown, et al. v. Heidersbach et al*. (1977), 172 Ind.App. 434, 360 N.E.2d 614." *Pipp* at p. 48.

The current status of the law was summarized in *Parkison v. McCue*, 831 N.E.2d 118, 128 (Ind. Ct. App. 2005):

> Easements burdening land with riparian rights attached do no necessarily provide the easement holder use of these riparian rights. *Brown v. Heidersbach*, 172 Ind. App. 434, 441, 360 N.E.2d 614, 619-20 (1977). Instead, we first look to the express language of the easement. *Klotz v. Horn*, 558 N.E.2d 1096, 1097-98 (Ind. 1990). "An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts." *Brown*, 172 Ind.App. at 441, 360 N.E.2d at 620. Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous. *Gunderson v. Rondenelli*, 677 N.E.2d 601, 603 (Ind.Ct.App. 1997) (citing *Klotz*, 558 N.E.2d at 1098). A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. See *Abbey Villas Dev. Corp. v. Site Contractors, Inc*., 716 N.E.2d 91, 100 (Ind. Ct.App. 1999), *trans. denied*.

"In order for the channel to be used lawfully for the placement of piers or other improvements, a purpose of the subject public way must have been to provide for the

placement of improvements by an express, implied or prescriptive authorization. Although several of the parties asserted the benefits of a prescriptive easement early in this proceeding, most or all of these assertions were specifically withdrawn before the hearing. No evidence was presented to support the existence of a prescriptive easement in favor of any party. To support the placement of piers or other improvements, the subject public way must make a grant of authority that is either express or implied. The evidence is to the contrary.

"The preponderance of the evidence is that the subject public way has existed perhaps since 1879. [Document references omitted] The subject public way is not a creature of modern lakeside or lake-vicinity development but rather a persisting roadway from an era when the local community was predominantly agrarian. A reasonable inference is that the original purpose of the subject public way was to avail use of Lake Wawasee itself as a public highway, implementing a perspective that Lake Wawasee was a navigable watercourse.

"The landmark decision in Indiana with respect to determining and applying navigability is *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950). The Indiana Supreme Court stated that the test for determining navigability is whether a river or lake "was available and susceptible for navigation according to the general rules of river transportation at the time Indiana was admitted to the Union" in 1816. The evidence in this proceeding does not disclose whether Lake Wawasee meets the *Kivett* standard for determining navigability. Authorities cited by the parties are insufficient to make a determination whether the *Kivett* standard was met. Yet a determination of the navigability of Lake Wawasee is here unnecessary.

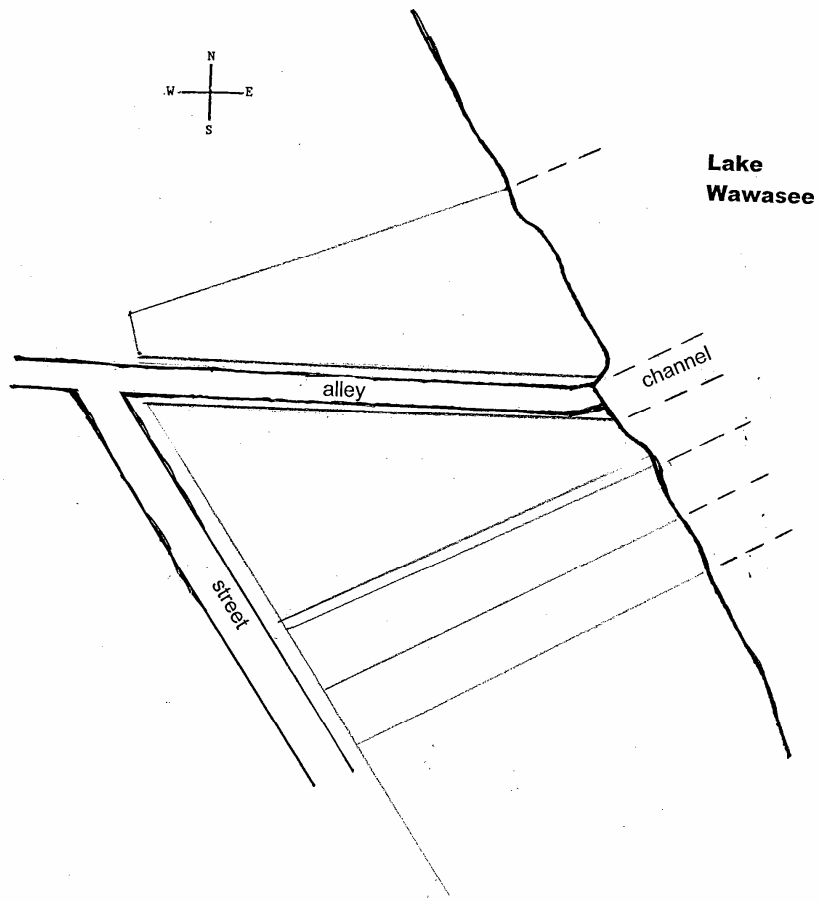
"The Indiana Court of Appeals was invited to determine whether Nyona Lake in Fulton County was legally navigable in *Bath v. Courts*, 459 N.E.2d 72 (Ind. App. 1984). Based upon the Lakes Preservation Act, however, the court found 'our statutory law renders such a determination unnecessary.' Based upon the Lakes Preservation Act, the court went on to apply a statute, which on its face governed navigable waters, to Lake Nyona. *Bath* at 75. Very recently, the Court of Appeals of Indiana again construed the Lakes Preservation Act and applied principles of navigable waters law to resolve a riparian dispute on Clear Lake, a 'public freshwater lake' in Steuben County. *Parkison v. McCue* cited previously. Regardless of whether Lake Wawasee is navigable, it is a 'public freshwater lake' that in 1947 became subject to the Lakes Preservation Act. Principles governing boating on a navigable watercourse also apply to a public freshwater lake. Illustrative is IC 14-26-2-5 and particularly IC 14-26-2-5(b)(2).

"The preponderance of the evidence is that the primary usage is consistent with the channel serving as a navigation corridor extending from the subject public way. Illustrative is seasonal usage for the commercial transport by boat of materials for the placement of piers at properties near the subject public way. In addition, the site is occasionally used as lake access for small recreational boats. Recently, the channel has also served as an access corridor to a dry hydrant maintained by the local fire department

on the adjacent property of the Masons. These purposes are consistent with the public rights described in the Lakes Preservation Act at IC 14-26-2-5.

"To hold otherwise would be to conclude the intent for the subject public way was the creation of a dead-end street. Ordinarily, a roadway that connects to a public freshwater lake is minimally intended to provide ingress and egress to and from the lake. Under proper facts, an intent may be documented that roadway was intended to provide more than ingress and egress. *Abbs v. Town of Syracuse*, 655 N.E.2d 114, 116 (Ind. App. 1995) citing *Klotz v. Horn*, cited previously, and *Metalf v. Houk*, 644 N.E.2d 597 (Ind. App. 1994). There is no evidence to support the proposition that the subject public way was intended as a dead-end street. The history of usage is consistent with the proposition that the function of the subject public was to provide ingress and egress to Lake Wawasee, and the geographic boundaries of the channel are an appropriate lakeward extension for ingress and egress." *Pipp* at p. 49.

"On the other hand, use of the channel for the placement of temporary piers or other improvements, or for the mooring of boats, is inconsistent with the likely intent of the subject public way and with the Lakes Preservation Act. The narrow channel makes it more like a water alley than a water boulevard. The placement of structures within the channel would pose navigational challenges and hazards. Spitler and Twigg are specifically found to have no legal or equitable rights beyond those of the general public to utilize the channel. Neither does the record support the proposition that another person has legal authority to place a pier or other improvement within the channel. The channel should properly be maintained as a navigation corridor. The construction of temporary piers or improvements and the mooring of boats within the channel should be prohibited." *Pipp* at p. 50.



***Ray v. Blackburn and Lukis, et al.*, 10 Caddnar 400 (2006):**

[NOTE: This proceeding is on judicial review, and the core issue is the delineation of riparian boundaries. The decision is a public record and may properly be reviewed and considered by the members of Advisory Council. Because the matter is active and may

be returned to the Division of Hearings regarding the boundaries, the Division of Hearings will not discuss the merits in presentations to the Advisory Council.]

Cause #: 05-101W
Caption: Ray v. Blackburn and Lukis, et al.
Administrative Law Judge: Jensen
Attorneys: Martin; Blackburn, pro se; Snyder; Wehrenberg, K. (for Wehrenberg property owners)
Date: December 16, 2006

[NOTE: ON JANUARY 16, 2007, RAY AND BLACKBURN SOUGHT JUDICIAL REVIEW IN THE STEUBEN CIRCUIT COURT IN CAUSE NUMBER 76C01-0701-PL-0033.]

FINAL ORDER

130. Riparian zones of the respective parties are determinable by extending their onshore property lines lakeward. Lukis', Ray's and the Blackburns' riparian zones are conclusively depicted in *Exhibit II, page 1, which is attached and incorporated as Appendix A*. The exact boundaries of the riparian zones controlled by the Wehrenbergs and Scheele will likely require a survey.

131. Absent a written agreement between impacted parties, each of the parties are obligated to maintain any temporary structure, as well as all appendages to the temporary structure (including watercraft), within their own individual riparian zone.

132. Consistent with the mandate of 312 IAC 11-3-1(b)(2 & 3) no party may place or maintain any temporary structure or any appendage to a temporary structure (including watercraft) within Lake James in a manner that infringes upon another riparian owner's or the public's access to Lake James or that serves as an impediment to navigation.

133. Notwithstanding findings 130 through 132, any party whose riparian zone overlaps the riparian zone of any other party shall be prohibited from placing or maintaining any temporary structure or appendage to a temporary structure (including watercraft) within that overlapping riparian area.

134. Notwithstanding findings 130 through 133, to improve navigational safety as well as provide for unimpeded ingress and egress for the benefit of adjacent riparian owners and the public as specified at 312 IAC 11-3-1(b)(2 & 3), Lukis shall remove the boatlift depicted in *Exhibit II, page 2, which is attached and incorporated as Appendix B*, from the east side of his temporary pier and is further restricted in his use of his riparian zone to the extent that any temporary structure or appendage to any temporary structure (including watercraft) shall not be placed or maintained closer to Lukis' eastern property line extended than what is depicted in *Exhibit II, page 1, see Appendix A*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[VOLUME 10, PAGE 401]

BACKGROUND:

1. On May 31, 2005 Dean Ray *(Ray)* commenced this proceeding with the filing of correspondence seeking "resolution of a pier dispute at Lake James, Angola, Indiana."

2. Ray's correspondence initiated a proceeding governed by IC 14-26-2-23(e)(3).

3. The Natural Resources Commission *(Commission)*, pursuant to IC 14-26-2-23(e)(3) adopted rules exempting from licensing requirements those activities that pose a minimal threat of harm to public freshwater lakes and establishing a process for the mediation and determination of disputes among persons with competing interests. *IC 14-26-2-23-(e)(2)(B) and (3)*.

4. The Commission's administrative rule authorizes the placement of qualifying temporary structures within public freshwater lakes under a general license. *312 IAC 11-3-1.*

5. With respect to disputes amongst persons with competing interests involving temporary structures placed under the general license authority of 312 IAC 11-3-1, a person may seek administrative review pursuant to IC 4-21.5 and 312 IAC 3-1. *312 IAC 11-3-2*.

6. Lake James, located in Angola, Steuben County, Indiana is a "public freshwater lake" as that term is defined at IC 14-26-2-3.

7. The Administrative Orders and Procedures Act, commonly referred to as "AOPA" found at IC 4-21.5 governs procedurally. The Commission also adopted administrative rules, found at 312 IAC 3-1, to aid in the implementation of AOPA in proceedings before it.

8. Pursuant to IC 14-10-2-3 and 312 IAC 3-1-2, the Commission is the "ultimate authority" for disputes under IC 14-26-2.

9. A prehearing conference was conducted on June 30, 2005 at which time, Claimant, Ray and Respondents, Michael Lukis *(Lukis)* and Thomas Blackburn and John Blackburn *(collectively "the Blackburns")* appeared. At that time, Lukis was also represented by Larry D. Macklin of Governmental Relations Consulting.

10. Following the prehearing conference the dispute underlying this proceeding was committed to mediation as anticipated by 312 IAC 11-3-2(c).

11. During the pendency of the mediation, on September 26, 2005, Lukis, who was now represented by Counsel, Stephen R. Snyder, filed his "Motion to Join Indispensable Parties" identified as James Wehrenberg and Thomas Scheele *(Scheele)* and his "Cross-Claim and Counterclaim" against the Blackburns, Ray, James Wehrenberg and Scheele.

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12. Lukis' motions were granted in an Order issued September 29, 2005. The Order joining James Wehrenberg and Scheele, along with a copy of the complete administrative proceeding record, was sent by U.S. First Class mail to James Wehrenberg and Scheele and was not returned. James Wehrenberg and Scheele were ordered to participate in upcoming mediation sessions. *See Order on Respondent, Michael Lukis', Motion to Join Indispensable Parties and Motion for Leave to File Counterclaim/Cross-Complaint and Entry with Respect to Mediation, dated September 29, 2005*.

13. On March 3, 2006, the appointed mediator, Stephen L. Lucas, notified the administrative law judge that the parties were at impasse.

14. A status conference was scheduled and conducted on March 28, 2006, at which time Ray, who had by this time retained the services of Counsel, appeared in person and by Counsel, George Martin. The Blackburns appeared in person and Lukis appeared by counsel, Stephen R. Snyder. Scheele and James Wehrenberg failed to appear.

15. During the status conference the administrative law judge was advised by the parties appearing that Scheele and James Wehrenberg had not, at any time, participated in the mediation. *See Report of Status Conference, dated April 6, 2006*.

16. During the status conference an administrative hearing was scheduled for June 8, 2006 and thereafter notice was issued to Scheele and James Wehrenberg by U.S. certified mail.

17. Service was obtained by certified mail upon Scheele April 14, 2006. *Certified Card 7002 2030 0006 6585 1230*

18. Confirmation of receipt of the April 6, 2006 Report of Status Conference was returned signed by Kelsey Wehrenberg on April 10, 2006. However, the certified mail was returned by U.S. Priority mail postmarked April 12, 2006 with the notation "James Wehrenberg does not live at this address and this letter is being returned unopened."

19. Eventually service to James Wehrenberg, by U.S. Certified mail, of a "Temporary Order Pursuant to 312 IAC 11-3-2(d)," which had been sought by Ray and opposed by Lukis, and the April 6, 2006 "Report of Status Conference," was accomplished on May 25, 2006. *Certified Cards 7002 2030 0006 6585 1346 and 7002 2030 0006 6585 1353*.

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20. Thereafter, on May 30, 2006, Kim Wehrenberg filed correspondence with the Commission indicating that he had been retained as Counsel by James Wehrenberg with respect to the instant proceeding.[1][1]

21. An impromptu telephone status conference was arranged and conducted on June 1, 2006 at which Thomas Blackburn, George Martin (on behalf of Ray), Stephen R. Snyder (on behalf of Lukis) and Kim Wehrenberg (on behalf of James Wehrenberg) participated.[2][2]

22. It was determined that the real property associated with James Wehrenberg *(Wehrenberg Property)* is actually co-owned by James Wehrenberg, Kim Wehrenberg and three (3) additional owners. Kim Wehrenberg was unwilling without first consulting with the remaining three (3) owners to disclose their identities or mailing addresses.

23. It was further determined that unless service of process was accomplished with respect to the three (3) remaining unidentified co-owners of the Wehrenberg Property, the administrative hearing would not occur on June 8, 2006.

24. On June 5, 2006, Kim Wehrenberg, filed correspondence indicating that he had been retained as Counsel on behalf of the owners of the Wehrenberg Property namely James Wehrenberg, Holly (Wehrenberg) Oliver, Gretchen (Wehrenberg) Stewart and Peter Wehrenberg. Kim Wehrenberg further indicated his intention to represent himself pro se.[3][3]

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[1][1] It was ultimately determined that the U.S. First Class Mail sent on September 29, 2006 and the U.S. Certified mail originally accepted by Kelsey Wehrenberg had been sent to the address of Kim Wehrenberg. Kim Wehrenberg acknowledged having returned the certified mail addressed to James Wehrenberg to the Commission.

[2][2] Due to Scheele's previous failures to participate despite having been provided with proper service of process, the administrative law judge did not possess a telephone number or e-mail address by which to notify him on such short notice of the telephone status conference.

[3][3] Kim Wehrenberg was offered the opportunity to have the administrative hearing continued but assured the administrative law judge he could be prepared to proceed on June 8, 2006 provided he received a copy of administrative file and exhibits of the remaining parties. Kim Wehrenberg, in later correspondence confirmed receipt of that material. *See "Report of Supplemental Status Conference and Notice of Joinder of Parties" and Kim Wehrenberg correspondence (undated but containing a fax transmittal date of June 5, 2006)*

25. On June 6, 2006, Kim Wehrenberg, Holly (Wehrenberg) Oliver, Gretchen (Wehrenberg) Stewart and Peter Wehrenberg, were joined as additional indispensable parties.

26. All parties appeared, by Counsel, in person or both, and the administrative hearing was conducted as scheduled on June 8, 2006 at the Department of Natural Resources, Division of Law Enforcement, District 2 Headquarters located in Columbia City, Indiana.

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27. The Commission has jurisdiction over the persons of the parties and of the subject matter of this proceeding.

28. Following the conclusion of the administrative hearing the parties sought and were provided an opportunity to file Post Hearing Briefs and/or Proposals.

29. Post hearing briefs were filed by Ray, Lukis and the Wehrenbergs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

30. Scheele is the owner of real property partially described as "Lots Numbered Sixty-one (61) and Sixty-six (66)[4][4] in the FIRST ADDITION TO GLENEYRE BEACH…" *Respondent's Exhibit L-11 and L-6*.

31. The Wehrenbergs are the owners of real estate partially described as "part of Lot No. 62 in the First Addition to Gleneyre Beach Lake James, the plat of said Addition being recorded in the Recorders Office of Steuben County, Indiana…" *Respondent's Exhibit L-7 and L-8*.

32. Ray, along with his wife Marilyn, is the owner of real property partially described as "a part of Lot #62 in the First Addition to Gleneyre Beach, Lake James." *Respondent's Exhibit L-10*.

33. The Blackburns are the co-owners of real property partially described as "Lots 63 and the east part of 64, Gleneyre Beach Addition to Lake James…" *Respondent's Exhibit L-9*.

34. Lukis is the owner of real property which "includes the west part of Lot Numbered 64 and the eastern portion of Lot Numbered 65 in said Plat of the First Addition to Gleneyre Beach on Lake James." *Respondent's Exhibit L-12*.

35. The First Addition to Gleneyre Beach on Lake James is a platted addition located entirely within Steuben County, Indiana. *Respondent's Exhibit L-5*.

[4][4] Scheele's ownership of Lot Number 66 is not at issue herein.

36. Within the “Plat of First Addition to Gleneyre Beach” is the obligation that an “association” be “formed by a majority of the lot owners in said addition…” *Respondent’s Exhibit L-5*.

37. Gleneyre Association, Incorporated was established with its express objectives pertaining to the “management, use, and ownership of lots, property, homes, and cottages in First Addition to Gleneyre Beach, Lake James, Indiana...” *Exhibit I*.

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38. “Rules, Regulations, Restrictions & Covenants” are included within the Constitution and Bylaws of Gleneyre Association Incorporated.

> The provisions referenced herein are for the mutual benefit and protection of all owners, present or future, or any and all real property in said addition; and they shall inure to the benefit of and be enforceable by the owner, or owners, of any land or lots included in said addition, their respective legal representatives, heirs, successors, grantees and assignees.
>
> The Association shall have the right to enforce all restrictions, conditions, covenants, reservations, policies, liens and charges now or hereinafter imposed by the provision of these covenants and restrictions. Failure by the Association or by any lot owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.
>
> …
>
> The rules and regulations will be made up of the following and will be contained in separate documents approved from time to time by the Association:
> 1. Restatement of the General Plat and Warranty Deed Restrictions
> 2. Committee Rules
> 3. Committee Policies
>
> …

Exhibit I.

39. The Grounds Committee of the Gleneyre Association established rules and regulations including a determination that “each lakefront lot owner shall have

full riparian rights to the lakefront bounded by the respective property lines extended past the shoreline." *Exhibit I*.

40. The parcels of real property involved in this proceeding are all located on the lakefront of Lake James and are essentially situated in order from east to west beginning with Scheele, the Wehrenbergs, Ray, the Blackburns and finally Lukis. *See Claimant's Exhibit B (bottom diagram), Respondent's Exhibit L-1*.

41. The parties' properties exist within a cove the center of which is essentially located at Lots 62 and 63 of the First Addition of Gleneyre Beach, owned by the Wehrenbergs, Ray and the Blackburns. *Claimant's Exhibit B*.

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42. Lukis' property fronts Lake James in a general southeastern direction while the Blackburns' frontage faces almost directly south followed by Ray's, the Wehrenbergs' and Scheele's properties, each of which front on Lake James in a south to slightly southwestern direction. *Exhibit II*[5][5], *Claimant's Exhibit K*

43. Lukis' property, part of Lot 64 and Lot 65 is situated at the western end of all the Lots contained within the First Addition to Gleneyre Beach. *Respondent's Exhibit L-13*.

44. Lukis' east property line (Blackburns' west property line) establishes a striking point of demarcation between a shoreline essentially unpopulated with temporary structures to the west and a portion of lakeshore heavily populated with temporary structures, to the east. *Respondent's Exhibit L-1 and Claimant's Exhibit B (top diagram), Respondent's Exhibit B-4*.

45. Lukis' lake frontage equals 85.19 feet, whereas the Blackburns' lake frontage measures 29.93 feet and Rays totals 24.02 feet. *Exhibit II*.

46. The Wehrenbergs' real property was not included within the survey completed for purposes of this proceeding, therefore the exact lake frontage possessed by the Wehrenbergs is not known. However, the Wehrenberg lake frontage can be reasonably approximated by subtracting the known lake frontage of the Ray property, or 24.02 feet, from the total lake frontage for Lot 62, or 60 feet. This calculation reveals that the Wehrenbergs lake frontage roughly approximates 35.98 feet.[6][6] *Compare Exhibit II and Claimant's Exhibit K*.

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[5][5] Exhibit II consists of four (4) pages that were also admitted as Claimant's Exhibits L, M, N and O.

[6][6] It is noted that the Wehrenbergs' Warranty Deed states the lake frontage is 41.6 feet. *Respondent's Exhibit L-8*. This discrepancy is not fully understood and is not critical to a determination of this proceeding.

47. The length of Scheele's lake frontage is similarly unknown and was not subject to any survey. However, the maps maintained by the Steuben County Auditor's Office indicates that Lot 61 includes twenty (20) feet of lake frontage. *Claimant's Exhibit K*.

48. The parties stipulated to the admission of a survey prepared jointly by Ray, Lukis and the Blackburns that depicts each of those parties' riparian zones by extending their respective property lines lakeward. *Exhibit II*.

49. While the survey depicting the parties' respective riparian zones was stipulated into evidence, Ray, the Blackburns and the Wehrenbergs dispute the reasonableness of determining riparian zones by the extension of property lines into Lake James.

50. That the parties are riparian owners says little about the riparian zones under their respective control.

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51. Riparian owners' use of public freshwater lakes is restricted by "lateral limitation for the enjoyment of other riparians and to perpendicular limitations for the enjoyment of the public." *Rufenbarger v. Lowe, 9 CADDNAR 150, 152, (2004)*.

52. While there is "no set rule in Indiana for establishing the extension of boundaries into a lake," *Id, citing Bath v. Courts, 459 N.E.2d 72, (Ind. App. 1984)*, two general premises for such determination have emerged. *Id*.

53. "Where a shoreline approximates a straight line and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore property boundaries" lakeward. *Id*.

54. However, "when the shoreline is irregular, and drawing lines at right angles to the shoreline would not accomplish a just apportionment, the boundary lines should divide the available navigable waterfront in proportion to the amount of shoreline of each owner…" *Id, relying on Bath, supra, and Nosek v. Stryker, 309 N.W.2d 868, (1981)*.

55. Based upon the evidence presented in the instant proceeding, the shoreline is generally irregular and the parties' onshore property lines are not perpendicular to the shoreline.

56. Therefore, Lukis' complete reliance upon the extension of onshore property boundaries lakeward is somewhat misplaced in this particular case. *See Brief of Respondent Michael Lukis, page 7*.

57. However, the riparian zones determined by extending onshore property lines lakeward appear to accomplish a just apportionment between the respective parties based upon the "amount of shoreline of each owner." *Rufenbarger, supra*.

58. The riparian zones of Ray, the Blackburns and Lukis are definitively identified in *Exhibit II*. These zones clearly establish that Ray possesses the smallest amount of lakeshore at 24.02 feet and in accordance with an apportionment methodology also possesses the smallest riparian zone. The Blackburns' 29.93 feet of shoreline is only slightly longer than Ray's and results in a riparian zone only slightly larger than Ray's. Lukis, who possesses by far the largest expanse of shoreline at 85.19 feet, controls the largest riparian zone of all the parties. *Exhibit II, Claimant's Exhibit G, and Claimant's Exhibit H*.

59. However, Scheele's and the Wehrenbergs' riparian zones must, for purposes of this analysis, be approximated based upon *Claimant's Exhibit K*.

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60. By all appearance, the Wehrenbergs, who possess somewhere between 35.98 feet and 41.6 feet of lakeshore (*see finding 46)* will be granted a riparian zone larger than the Blackburns, Scheele or Ray and smaller than Lukis, while Scheele's riparian zone based upon twenty feet of lakeshore, *see Claimant's Exhibit K*, will be similar in size to Ray's.

61. In this particular case, the result of establishing the parties' riparian zones by extending onshore property lines lakeward, equivocates the apportionment of riparian zones consistent with the amount of shoreline owned by each respective owner[7[7]]. *See Rufenbarger*.

62. It is hereby determined that establishing Ray's, Lukis', the Blackburns', the Wehrenbergs' and Scheele's riparian zones by extending their onshore property lines lakeward is appropriate. *Bath, Nosek, Rufenbarger, supra*.

63. In the situation presented here, extending the property lines lakeward results in Ray and the Blackburns, each possessing a "pie shaped" riparian zone with the lakeward terminus clearly identified by the point at which their respective east and west property lines extended intersect. *Exhibit II*.

[7[7]] The Gleneyre Association, Inc. through its rules and regulations, which are "maintained for the mutual benefit and protection of all owners," has determined that the riparian zones of lakefront owners shall be determined by the "property lines extended." *Exhibit I, pg 6*. Restrictive covenants of this type should be enforced unless they are ambiguous or violate public policy. *Renfro v. McGuyer, 799 N.E.2d 544, (Ind. App. 2003)*. The Gleneyre Association, Inc.'s rules, regulations, restrictions and covenants were not the deciding factor in this proceeding; however, it is noted that those rules and regulations are consistent with the conclusion reached.

64. For Ray and the Blackburns, the determination of riparian rights by extending property lines lakeward, results in small zones within their riparian control. *Exhibit II*.

65. Lukis' property lines extended, at one hundred feet lakeward of the shoreline, do not intersect. *Exhibit II*.

66. The Wehrenbergs' property was not the subject of a survey for purposes of the instant proceeding; however, Wehrenbergs' west property line is shared with Ray's east property line. Therefore, a review of *Exhibit II* reveals that the western extreme of Wehrenbergs' riparian zone intersects with the eastern extreme of Lukis' riparian zone at a point approximately eighty (80) feet from their respective shorelines. *Exhibit II (measuring Ray's west property line extended and Lukis' east property line extended using the scale of 1" = 10')*.

67. Consequently, both Lukis and Wehrenberg could place, and have placed, temporary structures immediately behind temporary structures placed by either Ray or the Blackburns. *Exhibit II, Claimant's Exhibit G (top photograph), Claimant's Exhibit M, Respondent's Exhibit W-1 (left photograph)*.

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68. Not only have both Lukis and the Wehrenbergs' placed temporary structures immediately behind the riparian zones controlled by the Blackburns and Ray, *Claimant's Exhibit G (top photograph),* because Lukis' and the Wehrenbergs' riparian zones eventually converge upon one another, they have each also placed temporary structures behind temporary structures maintained by the other. *Respondent's Exhibit W-1 (left photograph), Claimant's Exhibit M*.

69. This result is evidenced by Lukis' admission that in 2006 he reduced the length of his pier by four (4) feet because of the possibility that it extended into Lake James into an area where Lukis' and the Wehrenbergs' riparian zones overlapped. *Testimony of Lukis*.

70. Further exemplifying this situation is photographic evidence clearly showing that Wehrenbergs' sailboat is located within the overlapping riparian zone claimed by both the Wehrenbergs and by Lukis. *Compare Respondent's Exhibit L-3 to Claimant's Exhibit D (top photograph), E (bottom photograph) and H (bottom photograph), Respondent's Exhibit B-2, and Respondent's Exhibit W-1*.

71. The Scheele property was not the subject of a survey associated with this proceeding but it is approximated from the lot configurations that Scheele's east property line extended will intersect with Scheele's own west property line extended before

reaching sufficiently lakeward to intersect with Lukis' east property line extended.[8][8] *Claimant's Exhibit K*.

72. If this approximation is correct, Scheele's swim raft/basketball hoop shown to be located directly behind Lukis' temporary pier is outside Scheele's riparian zone. *Respondent's Exhibit L-13*.

73. While Scheele maintains a temporary pier, only his swim raft/basketball hoop was specifically addressed in this proceeding.

74. The Wehrenbergs maintain both a temporary pier and a sailboat anchored within Lake James off their lakeshore, but the Wehrenbergs temporary pier was not at issue herein. *Testimony of Lukis*.[9][9]

75. The sailboat's location varies within a fifty (50) foot diameter of its anchor point at times being located approximately fifty (50) feet behind the lakeward end of Lukis' temporary pier. *Testimony of Lukis*.

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76. As might be expected Lukis contends that the Wehrenbergs' sailboat is located within his riparian zone, while the Wehrenbergs contends that the sailboat is within their own riparian zone. *Testimony of Lukis, Respondent's Exhibits L-1, L-3 and L-4*.

77. No evidence was presented by any party, including the Wehrenbergs, indicating even an approximate distance of the sailboat from the Wehrenbergs' lake front;[10][10] however, the sailboat has been anchored at the same general location since at least 1983. *Testimony of Ray, Claimant's Exhibit D (top photograph), E (bottom*

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[8][8] The conclusions reached with respect to Scheele's riparian zone is strictly approximated based upon the evidence available herein. These conclusions are not intended, not shall they be construed as, determinative of the size, location, shape or any other characteristic of Scheele's riparian zone.

[9][9] It is acknowledged, as was pointed out on cross examination of Lukis by Kim Wehrenberg that Lukis' "Motion to Join Indispensable Parties" states that the reason for the necessary joinder was that the Wehrenberg pier "penetrates into the riparian area which is in controversy…" It became apparent throughout the administrative hearing, and was admitted by Lukis, that the Wehrenbergs' pier was not at issue. The sole temporary structure of the Wehrenbergs at issue in this proceeding is the sailboat anchored within Lake James off of the Wehrenbergs' lake front. In any event, the Wehrenbergs' are considered to be indispensable parties to this proceeding.

[10][10] Throughout the cross examination of Lukis, the opposed parties accused Lukis of retaining the services of "The Pier Place" to remove anchors for such items as the Wehrenbergs' sailboat and the Scheele's swim raft. Lukis acknowledged that "The Pier Place" was hired to remove obstructions from the area but denied any knowledge regarding the exact items removed. Any of the parties opposed to Lukis could have ensured the attendance of a representative of "The Pier Place" who possessed knowledge of the items removed at Lukis' direction, but none did so. Kim Wehrenberg alleged that the removal of the sailboat's anchor constituted "spoliation of evidence" making it impossible to establish the location of the sailboat or the limit to which it is capable of moving. It is not conceivable that the Wehrenbergs, who contend that the sailboat has been anchored in generally the same location for thirty years, are unable to provide any estimation of the distance of the sailboat from their lake shore simply because the anchor was removed.

photograph) and H (bottom photograph), Respondent's Exhibit B-2, Respondent's Exhibit W-1, Respondent's Exhibit L-3.

78. By all appearances both Lukis and the Wehrenbergs may be correct in their contention that the sailboat is positioned in their riparian zones because the riparian zones of Lukis and the Wehrenbergs overlap. *Exhibit II*.

79. Scheele testified that removal of the swim raft is not a problem. "My kids don't even use it. I put it out there for the benefit of all. Mr. Lukis' kids played on that all last year… I didn't mind…"

80. Ray testified that the Wehrenbergs' sailboat has caused no interference to their ingress and egress. *Testimony of Ray*.

81. Lukis maintains that Scheele's swim raft/basketball hoop and Wehrenbergs' sailboat interferes with ingress to and egress from his temporary pier. *Respondent's Exhibit L-3*.

82. A temporary pier has extended lakeward from the western portion of Lot 62 since Ray's in-laws purchased the property in 1983. *Testimony of Ray, Claimant's Exhibit D, Claimant's Exhibit E*.

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83. The size and configuration of Ray's temporary pier remained generally unchanged until 2005, except that it was moved approximately three (3) feet to the east in 1996 as a result of the Blackburns being required by Jerry Becker *(Becker)*, the previous owner of the property now owned by Lukis, to move their pier partially out of the riparian zone claimed by Becker. *See further discussion infra*.

84. Ray also maintains a boatlift on his temporary pier.

85. Ray acknowledged that if riparian zones are determined by property lines extended lakeward, the Blackburn pier did from 1983 to 2005 encroach upon what is now Lukis' riparian zone and similarly that the lakeward end of his pier has encroached upon the Blackburns' riparian zone. *Testimony of Ray*.

86. In 2005, Ray was forced to shorten his temporary pier by twenty (20) feet as a result of Lukis installing his newly configured pier and Lukis' refusal to allow the Blackburns' continued encroachment into what Lukis claims as his riparian zone.

87. The Blackburns have maintained a temporary pier at least since 1983. *Testimony of Ray, Claimant's Exhibit D (bottom photograph)*.

88. Prior to 1996 the Blackburns pier extended lakeward approximately forty (40) feet at which point it "jogged" over approximately seven feet toward what is now the Lukis

property and then extended lakeward for another twenty (20) feet. *Testimony of Ray, Claimant's Exhibit D (bottom photograph)*.

89. In 1995 and part of 1996, the property now owned by Lukis was owned by Becker. During Becker's ownership he insisted that the "jog" be removed from the Blackburns' temporary pier because it encroached upon his riparian zone. *Testimony of Becker*.

90. According to Becker's testimony, in 1996 the Blackburn pier was moved as far as possible out of Becker's riparian zone without causing a "domino effect" for the neighbors to the east of Blackburn but it remained within Becker's riparian zone. *Claimant's Exhibit E*.

91. Ray agreed that even after the reconfiguration of the Blackburns pier in 1996, it continued to encroach into Becker's riparian zone as determined by extending the property lines lakeward. *Testimony of Ray*.

92. Becker testified that in addition to the solution devised for 1996, he had advised the Blackburns that the pier had to be moved entirely out of his riparian zone for the 1997 boating season. *Testimony of Becker*. However, Becker sold the property in 1996 so no further discussions occurred between himself and the Blackburns. *Testimony of Becker*.

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93. The Blackburns' temporary pier, as modified at the insistence of Becker, continued to encroach into what is now Lukis' claimed riparian zone until 2005. *Testimony of Ray*.

94. The Wehrenbergs, Ray, the Blackburns and Scheele took great strides during the administrative hearing, on their own behalf and on behalf of each other, to establish that the Wehrenberg sailboat, the Scheele swimraft/basketball hoop as well as the Ray and the Blackburns piers had been located in certain locations and/or configured and angled in certain ways for a long period of time prior to the installation of Lukis' pier in 2005.

95. "A party might present facts to show the existence of a binding agreement with the other party, adverse possession, a prescriptive easement, or some other event of legal import that would determine riparian rights. Absent a showing of this consequence, the history of which structure or which boat was placed in which configuration and by whom does not present a material fact. First in time first in right is not a viable factual or legal principle for determining the rights of riparian owners or those of the public on the open waters of public freshwater lakes." *Barbee Villa Condominium Owners Association v. Shrock, 10 CADDNAR 23, (2005)*.

96. The evidence presented in the instant proceeding is insufficient to establish any legal right of the Wehrenbergs, Ray, the Blackburns or Scheele to the use of any portion of the riparian zone of Lukis.

97. That the Wehrenbergs have maintained their sailboat in the same general location for thirty (30) years does not establish any form of adverse possession or prescriptive easement when they at no time contend that the sailboat was ever anchored in the riparian zone now possessed by Lukis. *Wehrenbergs' Proposed Findings of Fact, Conclusions of Law and Proposed Order, paragraphs 21 & 22*.

98. Similarly, Scheele maintained throughout the administrative hearing only that his swim raft/basketball hoop was located solely within his own riparian area and furthermore provided no specific evidence as to its exact location.

99. The Blackburns, primarily through the testimony of Ray, established that their temporary pier has encroached upon what is now Lukis' riparian zone since as early as 1983. However, it is not disputed that this use was modified and was not always adverse to Lukis' predecessors in interest. This is clearly established by the undisputed testimony of Becker, who required a modification to the Blackburn pier and specifically authorized the Blackburns to encroach upon his riparian area in a diminished capacity for the 1996 boating season.

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100. Prescriptive easements are disfavored and absent the requisite clear and convincing proof any such claims must fail. *Rufenbarger, supra.*

101. In 2005, Lukis installed a pier extending eighty-nine (89) feet lakeward of the shoreline. Lukis temporary pier at the lakeward end measures 38.5 feet wide, which measurement includes a boatlift attached to the east side of the pier. *Exhibit II, page 1 & 2 and Claimant's Exhibit M*.

102. As a result of Lukis' temporary pier installation, the Blackburns were forced to relocate their temporary pier. *Testimony of Ray*.

103. In 2005, the Blackburns temporary pier remained at the same length but was no longer angled westward across the shared Blackburn/Lukis property line extended lakeward. Instead, the Blackburns' pier was relocated to a position entirely within their riparian zone and placed generally perpendicular with their shoreline. *Exhibit II, page 1*.

104. The relocation of the Blackburns temporary pier forced Ray to shorten his pier by twenty (20) feet because in the past that extension to Ray's pier had encroached into Blackburns' riparian zone. Ray installed his twenty (20) foot shorter temporary pier at its past location which resulted in only four feet six inches (4'6") of space between

the lakeward end of Ray's pier and the lakeward end of the Blackburns' pier. *Exhibit II, page 1*.

105. Consequently, Ray could not navigate his eight foot six inch (8'6") wide pontoon boat through the space remaining between his and the Blackburns' temporary piers making it impossible for him to moor his boat on the west side of his pier, as he has done since 1983. *Testimony of Ray, Exhibit II*.

106. Ray, as a temporary measure for the 2005 boating season, obtained permission from the Wehrenbergs to place his boatlift on the east side of his pier, in their riparian zone. *Claimant's Exhibit M, Respondent's Exhibit W-1, Claimant's Exhibit G (bottom photograph) and H*.

107. Lukis testified that the temporary pier he installed in 2005 is located sixteen (16) feet west of the property line extended that he shares with the Blackburns and the pier extends lakeward in a slight westward angle to increase the distance between the lakeward end of his and the Blackburns' respective piers. *Testimony of Lukis, Exhibit II (page 1)*.

108. The Blackburns, by installing their pier generally perpendicular to the shoreline, have caused the lakeward end of their pier to be located almost directly on the Blackburns' eastern property line extended that is shared with Ray. This allows for the lakeward end of the Blackburns' pier to be positioned as far away from the Lukis pier as is within the control of the Blackburns. *Exhibit II*.

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109. However, the distance between the Lukis and the Blackburn piers at the lakeward end are significantly reduced by the placement of boatlifts, by Lukis on the east side of his pier and by Blackburn on the west side of their pier. *Claimant's Exhibit M*.

110. Lukis' boatlift installed on the east side of his temporary pier measures eleven (11) feet wide by twenty-four (24) feet long and extends lakeward beyond the terminus end of his temporary pier. *Claimant's Exhibit M*.

111. The Blackburns boatlift, which measures nine feet nine inches (9'9") wide and twenty-two feet eight inches (22'8") long also extends lakeward beyond the end of their pier. *Claimant's Exhibit M*.

112. No evidence was presented by any party as to the exact distance remaining between Lukis' and the Blackburns' boatlifts, but it can be reasonably approximated from the scale of *Claimant's Exhibit M* that this distance does not exceed six (6) feet laterally. *See also Claimant's Exhibit P and Respondent's Exhibit L-1, L-2, L-4*.

113. The water depths associated with the entire eighty-nine (89) foot length of Lukis' temporary pier gradually increase from two feet four inches "(2'4") at the shoreline to

a maximum depth of three feet (3') at approximately sixty-five feet. The water depth remains consistent at three feet (3') from sixty-five (65) feet to the lakeward end of the temporary pier. *Testimony of Ray and Claimant's Exhibit M*.

114. While it is apparent that Ray wishes to maintain his temporary pier in the location where it has been placed since 1983 and moor his boat to the west side of that pier, this may now be impossible.

115. For example, Lukis appropriately pointed out during the administrative hearing that Ray does have the apparent ability to relocate his pier to his west property line extended thereby allowing him to moor his boat on the east side of his pier while remaining within his own riparian zone. *Testimony of Lukis*.

116. It is imperative that all of the parties embrace the reality that the old pier configurations, which obligated the Blackburns to encroach upon what is now the Lukis riparian zone in order to allow Ray to encroach upon the Blackburns are no more.

117. In this particular situation, where the water depth is not continuously six (6) feet deep to a distance of one hundred fifty (150) feet, a temporary pier qualifying for placement under a general license provided for at 312 IAC 11-3-1 may not extend beyond 150 feet from the legally established or average normal waterline or shoreline. *312 IAC 11-3-1(c)*.

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118. In addition to the restriction on the distance temporary structures may extend beyond the shoreline, those structures may not, within that one hundred fifty (150) foot distance, "infringe on the access of an adjacent landowner to the public freshwater lake," may not " unduly restrict navigation" and may not "be unusually wide or long relative to similar structure within the vicinity on the same public freshwater lake." *312 IAC 11-3-1(b)(2-4)*.

119. While 312 IAC 11-3-1(c) authorizes a riparian owner to place a temporary structure to a distance of one hundred fifty (150) feet from the shoreline, such authorization may be modified as necessary to afford adjacent riparians and the public with access and suitable navigation. *312 IAC 11-3-2(b)*.

120. Ray argues that Lukis' temporary pier is unusually wide and long in comparison to other temporary piers located in the vicinity. *Claimant, Dean Ray's Post Hearing Brief and Proposed Resolution*.

121. Evidence provided in this proceeding establishes no exact dimensions associated with any temporary piers installed and maintained by anyone within the First

Addition to Gleneyre Beach except for those pier maintained by Lukis, the Blackburns and Ray.

122. Much photographic evidence was admitted during the administrative hearing; however, most of the photographs are taken from ground level focusing primarily on the temporary piers maintained by the parties to this proceeding. These photographs do not provide an opportunity to compare the overall size of temporary piers in the entire vicinity of the First Addition to Gleneyre Beach.

123. Contrary to Ray's argument, one aerial photograph reveals that the lengths and widths of piers in the area vary greatly.[11[11]] *Respondent's Exhibit B-4*.

124. The evidence does not support a determination by a preponderance of the evidence that Lukis' temporary pier is unusually wide or long in contravention of 312 IAC 11-3-1(b)(4).

125. However, the claims of certain parties that the placement of temporary structures by certain of their neighbors infringe upon their access to the public waters of Lake James and unduly restrict their ability to navigate, are well taken.

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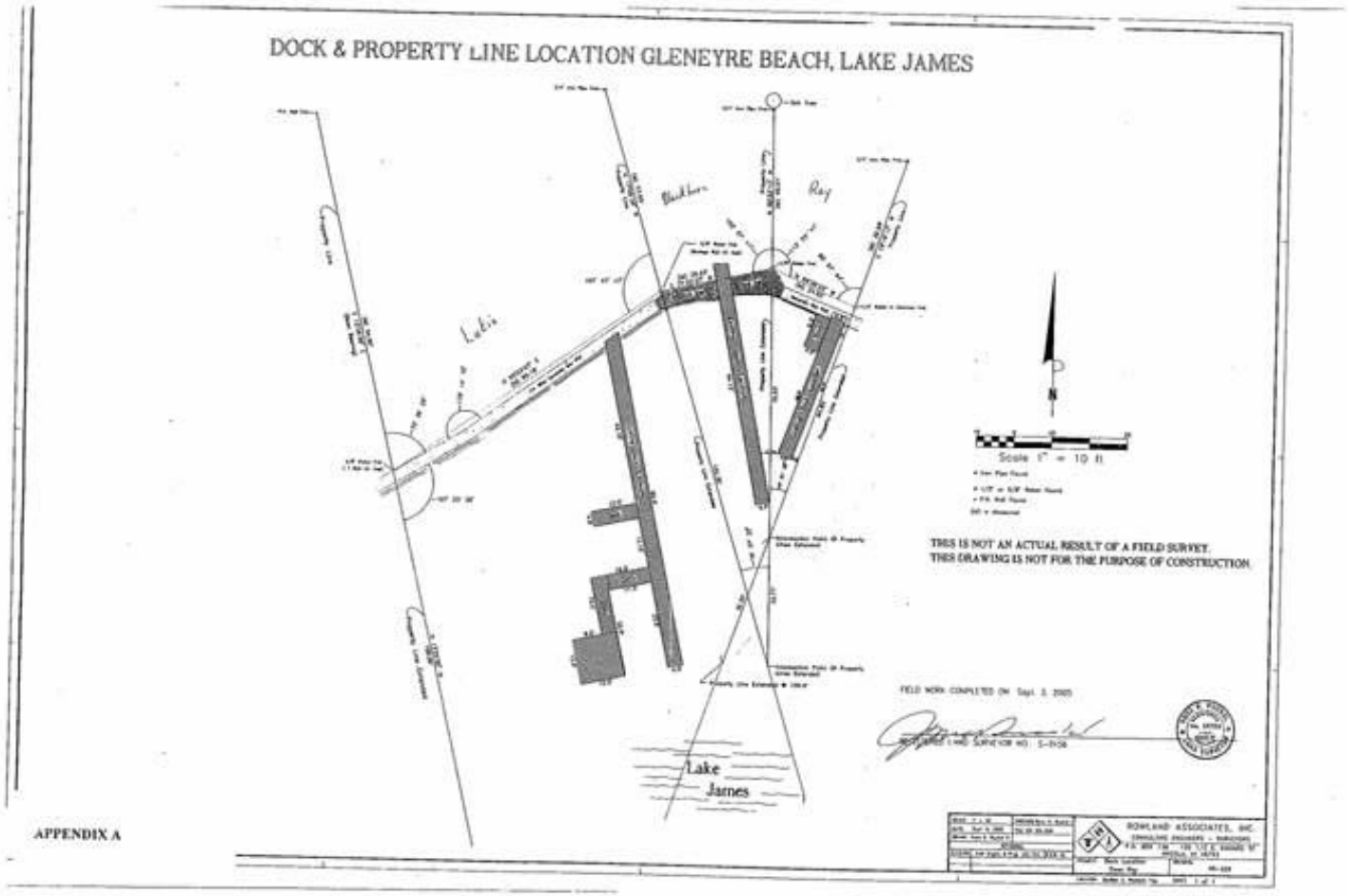
126. The Wehrenbergs' sailboat and the Scheele's swim raft/basketball hoop placed behind the piers of Lukis, Ray and the Blackburns, clearly creates a navigational difficulty and an impediment to access[12[12]].

127. Similarly, Lukis' act of mooring a watercraft on the east side of his pier, behind and approximately six (6) feet west of the moored watercraft of the Blackburns and directly in line with the angle of Ray's pier, equally infringes upon their access and presents a navigational obstruction for them.

128. The Blackburns and Ray, and likely Scheele, due to the size and shape of their riparian zones, lack any ability to accommodate their neighbors and only limited ability to improve their own situation.

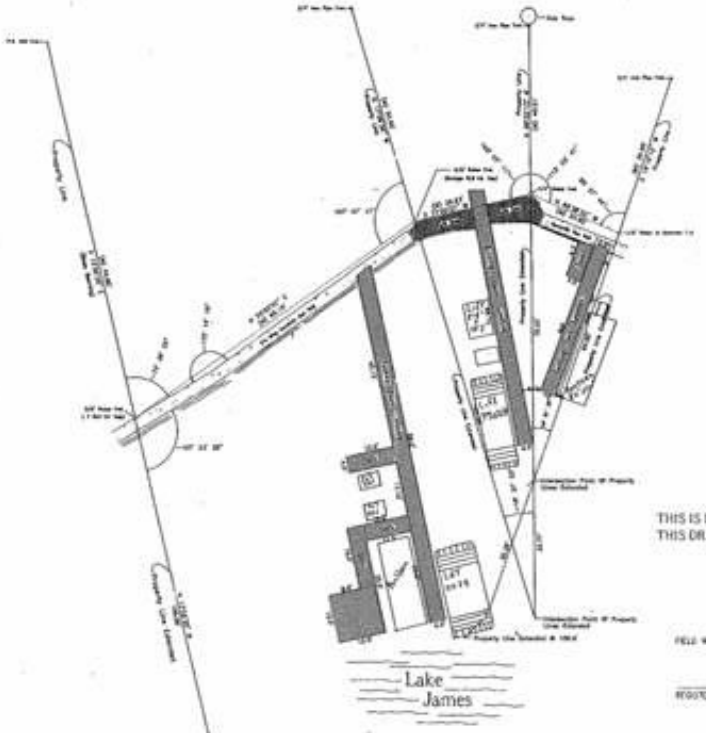
129. Conversely, particularly Lukis and to a somewhat lesser extent the Wehrenbergs, are permitted some flexibility by the size and shape of their riparian zones. As such, Lukis and the Wehrenbergs who possess the ability to either impede the remaining parties' access and navigation or improve the situation, must choose the latter.

[11[11]] It is acknowledged that certain of the larger structures depicted in the aerial photograph could be group piers or structures other than temporary structures, which would arguably be inappropriate for comparison to Lukis' temporary pier. That conclusion or inference cannot be made based upon the evidence presented.
[12[12]] While Ray and the Blackburns did not complain about the placement of Wehrenbergs' sailboat or Scheele's swim raft/basketball hoop, it is not reasonably understood how the placement of these items did not, at least occasionally, interfere with their ability to navigate.


DOCK & PROPERTY LINE LOCATION GLENEYRE BEACH, LAKE JAMES
Lake
James
Scale 1" = 10 ft
THIS IS NOT AN ACTUAL RESULT OF A FIELD SURVEY.
THIS DRAWING IS NOT FOR THE PURPOSE OF CONSTRUCTION.
ROWLAND ASSOCIATES, INC.

APPENDIX A

DOCK & PROPERTY LINE LOCATION GLENEYRE BEACH, LAKE JAMES



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THIS IS NOT AN ACTUAL RESULT OF A FIELD SURVEY.
THIS DRAWING IS NOT FOR THE PURPOSE OF CONSTRUCTION.

FIELD WORK COMPLETED ON Sept. 2, 2005

REGISTERED LAND SURVEYOR NO. L-0956

RICHLAND ASSOCIATES, INC.

APPENDIX B